



# IOWA ADMINISTRATIVE BULLETIN

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## PREFACE

The Iowa Administrative Bulletin is published biweekly in pamphlet form pursuant to Iowa Code chapters 2B and 17A and contains Notices of Intended Action on rules, Filed and Filed Emergency rules by state agencies.

It also contains Proclamations and Executive Orders of the Governor which are general and permanent in nature; Economic Impact Statements to proposed rules and filed emergency rules; Objections filed by Administrative Rules Review Committee, Governor or the Attorney General; and Delay by the Committee of the effective date of filed rules; Regulatory Flexibility Analyses and Agenda for monthly Administrative Rules Review Committee meetings. Other "materials deemed fitting and proper by the Administrative Rules Review Committee" include summaries of Public Hearings, Attorney General Opinions and Supreme Court Decisions.

The Bulletin may also contain Public Funds Interest Rates [12C.6]; Workers' Compensation Rate Filings [515A.6(7)]; Usury [535.2(3)"a"]; Agricultural Credit Corporation Maximum Loan Rates [535.12]; and Regional Banking—Notice of Application and Hearing [524.1905(2)].

**PLEASE NOTE:** *Italics* indicate new material added to existing rules; ~~strike-through~~ letters indicate deleted material.

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### CITATION of Administrative Rules

The Iowa Administrative Code shall be cited as (agency identification number) IAC (chapter, rule, subrule, lettered paragraph, or numbered subparagraph).

441 IAC 79	(Chapter)
441 IAC 79.1(249A)	(Rule)
441 IAC 79.1(1)	(Subrule)
441 IAC 79.1(1)"a"	(Paragraph)
441 IAC 79.1(1)"a"(1)	(Subparagraph)

The Iowa Administrative Bulletin shall be cited as IAB (volume), (number), (publication date), (page number), (ARC number).

## Schedule for Rule Making 1999

NOTICE SUBMISSION DEADLINE	NOTICE PUB. DATE	HEARING OR COMMENTS 20 DAYS	FIRST POSSIBLE ADOPTION DATE 35 DAYS	ADOPTED FILING DEADLINE	ADOPTED PUB. DATE	FIRST POSSIBLE EFFECTIVE DATE	POSSIBLE EXPIRATION OF NOTICE 180 DAYS
Dec. 25 '98	Jan. 13 '99	Feb. 2 '99	Feb. 17 '99	Feb. 19 '99	Mar. 10 '99	Apr. 14 '99	July 12 '99
Jan. 8	Jan. 27	Feb. 16	Mar. 3	Mar. 5	Mar. 24	Apr. 28	July 26
Jan. 22	Feb. 10	Mar. 2	Mar. 17	Mar. 19	Apr. 7	May 12	Aug. 9
Feb. 5	Feb. 24	Mar. 16	Mar. 31	Apr. 2	Apr. 21	May 26	Aug. 23
Feb. 19	Mar. 10	Mar. 30	Apr. 14	Apr. 16	May 5	June 9	Sept. 6
Mar. 5	Mar. 24	Apr. 13	Apr. 28	Apr. 30	May 19	June 23	Sept. 20
Mar. 19	Apr. 7	Apr. 27	May 12	May 14	June 2	July 7	Oct. 4
Apr. 2	Apr. 21	May 11	May 26	May 28	June 16	July 21	Oct. 18
Apr. 16	May 5	May 25	June 9	June 11	June 30	Aug. 4	Nov. 1
Apr. 30	May 19	June 8	June 23	June 25	July 14	Aug. 18	Nov. 15
May 14	June 2	June 22	July 7	July 9	July 28	Sept. 1	Nov. 29
May 28	June 16	July 6	July 21	July 23	Aug. 11	Sept. 15	Dec. 13
June 11	June 30	July 20	Aug. 4	Aug. 6	Aug. 25	Sept. 29	Dec. 27
June 25	July 14	Aug. 3	Aug. 18	Aug. 20	Sept. 8	Oct. 13	Jan. 10 '00
July 9	July 28	Aug. 17	Sept. 1	Sept. 3	Sept. 22	Oct. 27	Jan. 24 '00
July 23	Aug. 11	Aug. 31	Sept. 15	Sept. 17	Oct. 6	Nov. 10	Feb. 7 '00
Aug. 6	Aug. 25	Sept. 14	Sept. 29	Oct. 1	Oct. 20	Nov. 24	Feb. 21 '00
Aug. 20	Sept. 8	Sept. 28	Oct. 13	Oct. 15	Nov. 3	Dec. 8	Mar. 6 '00
Sept. 3	Sept. 22	Oct. 12	Oct. 27	Oct. 29	Nov. 17	Dec. 22	Mar. 20 '00
Sept. 17	Oct. 6	Oct. 26	Nov. 10	Nov. 12	Dec. 1	Jan. 5 '00	Apr. 3 '00
Oct. 1	Oct. 20	Nov. 9	Nov. 24	Nov. 26	Dec. 15	Jan. 19 '00	Apr. 17 '00
Oct. 15	Nov. 3	Nov. 23	Dec. 8	Dec. 10	Dec. 29	Feb. 2 '00	May 1 '00
Oct. 29	Nov. 17	Dec. 7	Dec. 22	Dec. 24	Jan. 12 '00	Feb. 16 '00	May 15 '00
Nov. 12	Dec. 1	Dec. 21	Jan. 5 '00	Jan. 7 '00	Jan. 26 '00	Mar. 1 '00	May 29 '00
Nov. 26	Dec. 15	Jan. 4 '00	Jan. 19 '00	Jan. 21 '00	Feb. 9 '00	Mar. 15 '00	June 12 '00
Dec. 10	Dec. 29	Jan. 18 '00	Feb. 2 '00	Feb. 4 '00	Feb. 23 '00	Mar. 29 '00	June 26 '00
Dec. 24	Jan. 12 '00	Feb. 1 '00	Feb. 16 '00	Feb. 18 '00	Mar. 8 '00	Apr. 12 '00	July 10 '00
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### PRINTING SCHEDULE FOR IAB

<u>ISSUE NUMBER</u>	<u>SUBMISSION DEADLINE</u>	<u>ISSUE DATE</u>
22	Friday, April 2, 1999	April 21, 1999
23	Friday, April 16, 1999	May 5, 1999
24	Friday, April 30, 1999	May 19, 1999

**PLEASE NOTE:**

Rules will not be accepted after **12 o'clock noon** on the Friday filing deadline days unless prior approval has been received from the Administrative Rules Coordinator's office.

If the filing deadline falls on a legal holiday, submissions made on the following Monday will be accepted.

The Administrative Rules Review Committee will hold its regular, statutory meeting on Monday, April 12, 1999, at 8 a.m. in Room 22, State Capitol, Des Moines, Iowa. The following rules will be reviewed:

Bulletin

**ACCOUNTANCY EXAMINING BOARD[193A]**

Professional Licensing and Regulation Division[193]  
COMMERCE DEPARTMENT[181]"umbrella"

Administrative procedures, 1.1, 2.17 to 2.28, ch 12, Notice ARC 8788A ..... 3/24/99

**AGRICULTURAL DEVELOPMENT AUTHORITY[25]**

AGRICULTURE AND LAND STEWARDSHIP DEPARTMENT[21]"umbrella"

Administrative procedures, 1.4 to 1.9, chs 7, 9 and 10, Notice ARC 8818A ..... 3/24/98

**AGRICULTURE AND LAND STEWARDSHIP DEPARTMENT[21]**

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MANAGEMENT DEPARTMENT[541]"umbrella"

Administrative procedures, 2.4, 5.3, ch 7, Notice ARC 8822A ..... 3/24/99

**BANKING DIVISION[187]**

COMMERCE DEPARTMENT[181]"umbrella"

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MANAGEMENT DEPARTMENT[541]"umbrella"

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**COUNTY FINANCE COMMITTEE[547]**

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**CREDIT UNION DIVISION[189]**

COMMERCE DEPARTMENT[181]"umbrella"

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- Administrative procedures, 2.7, chs 13, 18, and 28, Notice ARC 8854A ..... 3/24/99

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**ENVIRONMENTAL PROTECTION COMMISSION[567]**

NATURAL RESOURCES DEPARTMENT[561]“umbrella”

- Scope of title—definitions—forms—rules of practice; compliance; controlling pollution; emission standards for contaminants; measurement of emissions, 20.2, 21.2(1)“a”(6), 21.2(3)“c,” 22.1(1), 22.1(2)“e,” “i” and “m,” 22.1(2)“s”(1), 22.1(3)“b,” 22.4(1), 22.5(2), 22.5(4)“g,” 22.5(6)“c,” 22.6, 22.7(1), 22.8(1)“e,” 22.100, 22.101(2), 22.102(1), 22.103(2), 22.106(7), 22.120, 22.122(1)“b,” 22.125(7)“g,” 22.134, 22.139(1), 22.144(1), 22.201(2)“b,” 22.300(3)“b” and “c,” 22.300(4)“b,” 22.300(7), 23.1(2), 23.1(4), 23.1(4)“s,” “bg” and “bi,” 23.1(5), 23.1(5)“a”(2)“3,” 23.1(5)“a”(3)“1” and “2,” 23.1(5)“a”(6)“1,” 23.1(5)“b”(1), 23.2(3)“g,” 23.3(2)“a,” 23.3(2)“d”(7), 23.3(3)“b” to “f,” 23.4(4), 25.1(6), 25.1(10)“a,” Notice ARC 8744A ..... 3/10/99

**ETHICS AND CAMPAIGN DISCLOSURE BOARD, IOWA[351]**

- General, 1.4(4), 3.4, 4.1(4), 4.42(1)“aa,” 4.42(2)“c” to “f,” 4.42(3)“d,” 4.70(1), 4.86, 5.1(1), 5.3(2), 5.3(5), 6.2(5), 6.4, 7.2, 7.4, 7.5, 7.8, 7.14, 7.21, 7.22(2) to 7.22(4), ch 9, 11.4 to 11.6, 12.1(7), Filed ARC 8807A ..... 3/24/99
- Agency procedure for rule making, ch 14, Notice ARC 8812A ..... 3/24/99

**HUMAN RIGHTS DEPARTMENT[421]**

- Administrative procedures, 2.1, 2.3(1), 2.6, chs 3 to 6, Notice ARC 8814A ..... 3/24/99

**HUMAN SERVICES DEPARTMENT[441]**

- Mental health service providers, 24.1, 24.2(2)“b”(1) and (3), 24.3(7), 24.3(7)“b”(3), Filed ARC 8801A ..... 3/24/99
- Resources attributed to community spouse; state supplementary assistance program, 51.4(1), 51.7, 52.1(1) to 52.1(3), 52.1(3)“a”(2), 75.5(3)“d,” 75.16(2)“d”(3), 177.4(3), 177.4(7), 177.4(8)“b,” Filed ARC 8722A ..... 3/10/99
- Home- and community-based services waiver programs, 77.30(3)“b”(3), 77.33(1)“b”(3), 77.33(11)“d,” 77.33(15)“a”(3), 77.34(7)“b”(3), 77.39(21), 77.39(21)“d,” 77.39(23)“a” and “b,” 78.13(10)“a,” 78.34(4), 78.34(7)“a”(9) and (12), 78.34(7)“g” to “l,” 78.37(15)“a”(9) and (12), 78.37(15)“g” to “l,” 78.38(8)“a”(9) and (12), 78.38(8)“g” to “l,” 78.41(7)“h”(2), 78.41(8)“a”(9) and (12), 78.41(8)“g” to “l,” 78.43(4)“g”(2), 78.43(13)“a”(9) and (12), 78.43(13)“g” to “l,” 79.1(2), 83.2(2)“a” and “b,” 83.3(2)“b”(3), 83.3(3)“e,” 83.22(2)“b,” 83.42(2)“b,” 83.61(1)“a” and “e,” 83.61(2)“d,” 83.61(4)“a”(4), 83.61(4)“b”(2), 83.82(1)“h,” 83.87(4), Filed ARC 8723A ..... 3/10/99
- Healthy and well kids in Iowa (HAWK-I) program, 86.1, 86.15(6)“c”(1), 86.15(7), 86.15(8), 86.15(9)“b”(2) and (6), Filed ARC 8726A ..... 3/10/99
- CSRU—emancipation verification, 95.25, Notice ARC 8787A ..... 3/24/99
- Prioritization of persons on waiting lists for state child care assistance, 170.2(3)“a,” Filed ARC 8724A ..... 3/10/99

**INSPECTIONS AND APPEALS DEPARTMENT[481]**

- Administration, contested cases, 1.6, 10.1, 10.29, Notice ARC 8797A ..... 3/24/99
- Rule making, declaratory orders, ch 3, 4.5(5), 4.6, 4.10, Notice ARC 8798A ..... 3/24/99
- Update of references, 51.20(2)“j”(2), 51.20(2)“k,” 51.20(4)“a”(3), Notice ARC 8757A ..... 3/10/99

**INSURANCE DIVISION[191]**

COMMERCE DEPARTMENT[181]"umbrella"

- Administrative procedures, chs 2 to 4, Notice **ARC 8836A** ..... 3/24/99
- Electronic filing; insurance producer; forms; examinations, 5.3, 5.26(6), 5.42, 15.13(1)"a," 21.1(1), 21.3, 21.4, 21.5"9" to "11," 21.6, 31.1, 31.6, 33.2(2), 33.11, 40.1, 40.19, 45.10(6), ch 45 form B item 7 paragraph "c," Filed **ARC 8848A** ..... 3/24/99
- Prearranged funeral contracts—denial, suspension or revocation of sales permit for CSAC noncompliance, 19.24, Filed **ARC 8837A** ..... 3/24/99
- Securities—denial, suspension or revocation of license for CSAC noncompliance, 50.6, Filed **ARC 8838A** ..... 3/24/99

**LABOR SERVICES DIVISION[875]**

WORKFORCE DEVELOPMENT DEPARTMENT[871]"umbrella"

- Administrative procedures, interest due, ch 1, 150.11(4), 150.15, 202.9, rescind ch 300, Notice **ARC 8847A** ..... 3/24/99
- General industry safety and health, 10.20, Filed Emergency After Notice **ARC 8846A** ..... 3/24/99
- Construction safety and health, 26.1, Filed Emergency After Notice **ARC 8845A** ..... 3/24/99

**LANDSCAPE ARCHITECTURAL EXAMINING BOARD[193D]**

Professional Licensing and Regulation Division[193]

COMMERCE DEPARTMENT[181]"umbrella"

- Administrative procedures, 1.1, ch 4, 5.17, ch 7, Notice **ARC 8800A** ..... 3/24/99
- Certificate of noncompliance from the college student aid commission, 2.12, 4.13, 5.17, Notice **ARC 8424A** Terminated **ARC 8799A** ..... 3/24/99

**LATINO AFFAIRS DIVISION[433]**

HUMAN RIGHTS DEPARTMENT[421]"umbrella"

- Administrative procedures, chs 3 to 5 and 7, Notice **ARC 8825A** ..... 3/24/99

**LAW ENFORCEMENT ACADEMY[501]**

- Administrative procedures, 6.2(2)"d"(4), 6.3, 6.4, chs 14 and 15, Notice **ARC 8830A** ..... 3/24/99

**LOTTERY DIVISION[705]**

REVENUE AND FINANCE DEPARTMENT[701]"umbrella"

- Prize payment for prizes paid over a term exceeding ten years, financial responsibility, administrative procedures, 1.29, 2.16, 6.1, 6.2, 6.3(1), 6.5, 6.6, 6.8, 6.14, 6.21, 6.22, 6.28 to 6.30, ch 7, 13.23, ch 14, Notice **ARC 8856A** ..... 3/24/99

**MANAGEMENT DEPARTMENT[541]**

- Declaratory orders, procedure for rule making, ch 6, 7.5(5), 7.6, 7.10, Notice **ARC 8821A** ..... 3/24/99

**MEDICAL EXAMINERS BOARD[653]**

PUBLIC HEALTH DEPARTMENT [641]"umbrella"

- Administrative procedures, impaired physician review committee, ch 2, 10.10, chs 12 and 16, Notice **ARC 8857A** ..... 3/24/99

**NATURAL RESOURCE COMMISSION[571]**

NATURAL RESOURCES DEPARTMENT[561]"umbrella"

- Free lifetime fishing licenses to persons with severe mental or physical disabilities, 15.7(1), 15.8 to 15.12, Filed **ARC 8741A** ..... 3/10/99
- Local recreation infrastructure grants program, 29.7(4), 29.9, Filed **ARC 8750A** ..... 3/10/99
- Boating passenger capacity rating, 39.1, 39.2, Filed **ARC 8745A** ..... 3/10/99
- Game management areas, 51.5(2)"b," 51.9, Notice **ARC 8747A** ..... 3/10/99
- Wildlife refuges, 52.1(2)"a," Notice **ARC 8748A** ..... 3/10/99
- Waterfowl and coot hunting seasons, 91.1, 91.3, 91.4(2)"g," "h" and "o," 91.6, Notice **ARC 8746A** ..... 3/10/99
- Nonresident deer hunting, 94.1, 94.6, 94.8, Filed **ARC 8742A** ..... 3/10/99
- Wild turkey fall hunting, 99.2(1)"f" and "h," 99.5, Notice **ARC 8743A** ..... 3/10/99
- Deer hunting, 106.2(4), 106.8(2), 106.10(6), Notice **ARC 8749A** ..... 3/10/99

**NURSING BOARD[655]**

PUBLIC HEALTH DEPARTMENT[641]"umbrella"

- Licensure—English proficiency, 3.4(6), Notice **ARC 8803A** ..... 3/24/99
- Discipline, ch 4, Notice **ARC 8804A** ..... 3/24/99
- Continuing education, 5.3(2)"a," Notice **ARC 8805A** ..... 3/24/99
- Administrative procedures, chs 8 to 10 and 14, Notice **ARC 8806A** ..... 3/24/99

**PAROLE BOARD[205]**

CORRECTIONS DEPARTMENT[201]"umbrella"

- Revision of all board of parole administrative rules, chs 1 to 15, Notice **ARC 8853A** ..... 3/24/99

**PERSONNEL DEPARTMENT[581]**

Administrative procedure Act, 19.2 to 19.16, 21.9(5), chs 26 and 31, Notice ARC 8756A ..... 3/10/99

**PETROLEUM UNDERGROUND STORAGE TANK FUND BOARD, IOWA COMPREHENSIVE[591]**

Rescission of installer/inspector insurance program, 15.5(4)"a"(1), 15.5(4)"b" to "g," Filed ARC 8811A ..... 3/24/99

**PHARMACY EXAMINERS BOARD[657]**

PUBLIC HEALTH DEPARTMENT[641]"umbrella"

Discipline, 1.2, 4.1, 17.16, 19.3, ch 36, Notice ARC 8777A ..... 3/10/99

Personnel histories, 6.2(4), 7.6(6), 19.5, Filed ARC 8772A ..... 3/10/99

Temporary absence of pharmacist, 6.6(2), Filed ARC 8771A ..... 3/10/99

Return of drugs and appliances, 6.9, Notice ARC 8210A Terminated ARC 8766A, also Notice ARC 8778A ..... 3/10/99

Unit dose dispensing systems, 7.11, Notice ARC 8779A ..... 3/10/99

Unit dose dispensing system; pharmaceutical care, 8.9, 8.13(4), 8.13(5)"e," 8.14(2), 8.17, 8.32(6), 9.1(4)"y," 15.8(1), Notice ARC 8211A Terminated ARC 8767A ..... 3/10/99

Long-term care pharmacies, 8.9, 8.13(4), 8.13(5)"e," 8.14(2), 8.32(6), 15.8(1), ch 23, Notice ARC 8780A ..... 3/10/99

Discipline; contested cases, rescind ch 9, adopt ch 35, Notice ARC 8781A ..... 3/10/99

Discipline, 9.2(1) to 9.2(5), Notice ARC 8414A Terminated ARC 8768A ..... 3/10/99

Correction of rule reference, 15.9"1," Filed ARC 8773A ..... 3/10/99

Pharmacy compounding practices, 20.1 to 20.3, 20.4(1), 20.4(2), 20.4(5), 20.5(1), 20.6, 20.7, 20.8(1), 20.9, 20.10(1), 20.10(2), 20.10(6), 20.11(1), 20.12(2), 20.12(3), Notice ARC 8782A ..... 3/10/99

Pharmacy technicians—delegation of technical functions, unethical conduct or practice, 22.13, 22.21, Filed ARC 8774A ..... 3/10/99

Long-term care pharmacies, ch 23, Notice ARC 8212A Terminated ARC 8769A ..... 3/10/99

Child support noncompliance, 25.1, 25.3(5), Filed ARC 8775A ..... 3/10/99

Declaratory orders, ch 27, Notice ARC 8783A ..... 3/10/99

Agency procedure for rule making, ch 28, Notice ARC 8784A ..... 3/10/99

Student loan default or noncompliance with agreement for payment of obligation, ch 31, Filed ARC 8776A ..... 3/10/99

**PROFESSIONAL LICENSURE DIVISION[645]**

PUBLIC HEALTH DEPARTMENT[641]"umbrella"

CSRU and CSAC noncompliance, administrative procedures, impaired practitioner, chs 6 to 9 and 11 to 17, Notice ARC 8834A ..... 3/24/99

Chiropractic examiners, rescind 40.21 to 40.23, 40.25 to 40.35, amend 40.24, rescind 40.47 and chs 41, 42 and 49, Notice ARC 8833A ..... 3/24/99

Cosmetology arts and sciences examiners, 60.10(1), 64.1(1), 64.2, 64.3, 64.6, Filed ARC 8755A ..... 3/10/99

Cosmetology arts and sciences examiners, 63.4(4) to 63.4(18), 63.5(6), 63.12(3) to 63.12(11), Filed ARC 8753A ..... 3/10/99

Mortuary science examiners, 101.3(1)"a," "b" and "g," 101.3(2)"b" and "e," 101.3(2)"f"(1), Notice ARC 8751A ..... 3/10/99

Psychology examiners, rescind 240.200 to 240.211 and 240.213 to 240.300, amend 240.212, rescind chs 241, 242, and 249, Notice ARC 8840A ..... 3/24/99

Social work examiners, 280.1, 280.100(1), 280.101(2), 280.105(2), rescind 280.200 to 280.211, amend 280.212, 280.213(6), rescind chs 281 to 285 and 289, Notice ARC 8832A ..... 3/24/99

Speech pathology and audiology examiners, ch 300, 301.2, 301.4(1)"c," 301.5 to 301.10, Notice ARC 8752A ..... 3/10/99

Athletic training examiners, rescind 350.22 to 350.25, 350.27 to 350.30, amend 350.26, rescind chs 355 to 358, Notice ARC 8831A ..... 3/24/99

**PUBLIC EMPLOYMENT RELATIONS BOARD[621]**

Administrative procedure Act, 1.5, 1.6(7), 1.7, 2.2, 2.3, 2.20, 2.21, 7.7(5), ch 10 title, 10.1 to 10.10, 12.13(3), Notice ARC 8758A ..... 3/10/99

**PUBLIC HEALTH DEPARTMENT[641]**

Administrative procedures, chs 171 to 173, Notice ARC 8852A ..... 3/24/99

Student loan noncompliance, ch 195, Notice ARC 8851A ..... 3/24/99

**PUBLIC SAFETY DEPARTMENT[661]**

Breath testing devices, 7.2(3), Notice ARC 8796A ..... 3/24/99

Administrative procedures, ch 10, Notice ARC 8855A ..... 3/24/99

Criminal history records, 11.2, 11.5, 11.21, Filed Emergency ARC 8790A ..... 3/24/99

**RACING AND GAMING COMMISSION[491]**

INSPECTIONS AND APPEALS DEPARTMENT[481]"umbrella"

Rule making and declaratory orders, ch 2, Notice ARC 8810A ..... 3/24/99

**REAL ESTATE APPRAISER EXAMINING BOARD[193F]**

Professional Licensing and Regulation Division[193]

COMMERCE DEPARTMENT[181]"umbrella"

Administrative procedures, 1.1, 2.12 to 2.23, ch 8, Notice ARC 8813A ..... 3/24/99**REAL ESTATE COMMISSION[193E]**

Professional Licensing and Regulation Division[193]

COMMERCE DEPARTMENT[181]"umbrella"

Business conduct, administrative procedures, 1.23(5), 1.23(6), 1.42(10), 1.42(11), chs 4 and 7, Notice ARC 8792A ..... 3/24/99**REVENUE AND FINANCE DEPARTMENT[701]**State board of tax review, administrative procedures, 1.2 to 1.4, ch 2, Notice ARC 8850A ..... 3/24/99Administrative procedures, ch 7, 10.117 to 10.123, 10.126, Notice ARC 8786A ..... 3/24/99Condominiums classified as commercial or residential real estate, 71.1(4), 71.1(5), Filed ARC 8725A ..... 3/10/99Offset of debts owed state agencies, 150.10 to 150.16, Notice ARC 8785A ..... 3/24/99**SECRETARY OF STATE[721]**Administrative procedures, chs 7 to 9, Notice ARC 8842A ..... 3/24/99Proposed constitutional amendments, 21.200(5), Notice ARC 8843A ..... 3/24/99**SOIL CONSERVATION DIVISION[27]**

AGRICULTURE AND LAND STEWARDSHIP DEPARTMENT[21]"umbrella"

Administrative procedures, chs 3 to 5, Notice ARC 8815A ..... 3/24/99Allocation to soil and water conservation districts, 12.51, 12.72(7), 12.72(8), 12.76(8), 12.76(9), Notice ARC 8759A ..... 3/10/99**STATE PUBLIC DEFENDER[493]**

INSPECTIONS AND APPEALS DEPARTMENT[481]"umbrella"

Declaratory orders, procedure for rule making, chs 3 and 5, Notice ARC 8793A ..... 3/24/99**STATUS OF WOMEN DIVISION[435]**

HUMAN RIGHTS DEPARTMENT[421]"umbrella"

Administrative procedures, chs 7 to 9, Notice ARC 8816A ..... 3/24/99**TELECOMMUNICATIONS AND TECHNOLOGY COMMISSION, IOWA[751]**Administrative procedures, chs 3, 4, and 18, Notice ARC 8841A ..... 3/24/99**TRANSPORTATION DEPARTMENT[761]**

Logo signing, 118.2(2), 118.2(3)"b," 118.2(4), 118.3, 118.4(2), 118.4(4)"b," 118.4(5)"b," 118.4(7),

118.4(8), 118.5(1)"b," 118.5(2) to 118.5(4), 118.6(1), 118.6(2)"b," 118.6(3), Notice ARC 8789A ..... 3/24/99Vehicle registration and certificate of title, 400.60(1)"c," Notice ARC 8794A ..... 3/24/99Towing wrecked or disabled vehicles, ch 454, Filed ARC 8721A ..... 3/10/99Federal Motor Carrier Safety Regulations, 520.1(1)"a" and "b," 520.2, 520.4(2), 520.7, 520.8, Filed ARC 8720A ..... 3/10/99OWI revocations—petition to reopen a hearing, 620.4(5), Filed ARC 8730A ..... 3/10/99**TREASURER OF STATE[781]**Administrative procedures, chs 17 and 18, Notice ARC 8835A ..... 3/24/99**VETERINARY MEDICINE BOARD[811]**Administrative procedures, chs 3, 4, and 10, Notice ARC 8820A ..... 3/24/99**WORKERS' COMPENSATION DIVISION[876]**

WORKFORCE DEVELOPMENT DEPARTMENT[871]"umbrella"

Contested cases; declaratory orders; formal review and waiver of rules, 4.1(16), 4.1(17), 4.8(2)"a,"

4.9(6), 4.9(9), 4.38, chs 5 and 12, Notice ARC 8760A ..... 3/10/99**WORKFORCE DEVELOPMENT BOARD/SERVICES DIVISION[877]**

WORKFORCE DEVELOPMENT DEPARTMENT[871]"umbrella"

Criticism of agency rule, 2.3, Notice ARC 8732A ..... 3/10/99Petition for declaratory order, 26.2, Notice ARC 8731A ..... 3/10/99**WORKFORCE DEVELOPMENT DEPARTMENT[871]**Organizational structure, 1.1(6), 2.1(2), 2.4(4), 2.5, 2.7(2)"i" to "k," 2.8, Notice ARC 8809A ..... 3/24/99Contested cases proceedings, 26.2 to 26.17, Notice ARC 8791A ..... 3/24/99Administrative procedures, 43.5, ch 44 title, 44.1 to 44.12, Notice ARC 8849A ..... 3/24/99

**ADMINISTRATIVE RULES REVIEW COMMITTEE MEMBERS**

Regular statutory meetings are held the second Tuesday of each month at the seat of government as provided in Iowa Code section 17A.8. A special meeting may be called by the Chair at any place in the state and at any time.

**EDITOR'S NOTE: Terms ending April 30, 1999.**

Senator H. Kay Hedge, Chairperson  
3208 335th Street  
Fremont, Iowa 52561

Senator Merlin E. Bartz  
2081 410th Street  
Grafton, Iowa 50440

Senator Patricia M. Harper  
3336 Santa Maria Drive  
Waterloo, Iowa 50702

Senator John P. Kibbie  
P.O. Box 190  
Emmetsburg, Iowa 50536

Senator Sheldon Rittmer  
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Representative Christopher Rants, Vice-Chairperson  
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Sioux City, Iowa 51106

Representative Danny Carroll  
244 400th Avenue  
Grinnell, Iowa 50112

Representative Minnette Doderer  
2008 Dunlap Court  
Iowa City, Iowa 52245

Representative Geri Huser  
213 7th Street NW  
Altoona, Iowa 50009

Representative Janet Metcalf  
12954 NW 29th Drive  
Urbandale, Iowa 50323

Brian Gentry  
**Administrative Rules Coordinator**  
Governor's Ex Officio Representative  
Capitol, Room 11  
Des Moines, Iowa 50319

## To All Agencies:

The Administrative Rules Review Committee voted to request that Agencies comply with Iowa Code section 17A.4(1)"b" by allowing the opportunity for oral presentation (hearing) to be held at least **twenty** days after publication of Notice in the Iowa Administrative Bulletin.

AGENCY	HEARING LOCATION	DATE AND TIME OF HEARING
<b>AGRICULTURAL DEVELOPMENT AUTHORITY[25]</b>		
Agency procedures, 1.4 to 1.9, chs 7, 9, 10 IAB 3/24/99 <b>ARC 8818A</b>	Conference Room 505 Fifth Ave., Suite 327 Des Moines, Iowa	April 28, 1999 9:30 a.m.
<b>AGRICULTURE AND LAND STEWARDSHIP DEPARTMENT[21]</b>		
Agency procedures, chs 2, 4, 5 IAB 3/24/99 <b>ARC 8819A</b>	Conference Room—1st Floor Wallace State Office Bldg. Des Moines, Iowa	April 16, 1999 1 p.m.
Apiary, 22.10 IAB 3/10/99 <b>ARC 8733A</b> (See also ARC 8734A)	Conference Room—3rd Floor Wallace State Office Bldg. Des Moines, Iowa	March 30, 1999 10 a.m.
<b>BANKING DIVISION[187]</b>		
Agency procedures, chs 5, 6, 11 IAB 3/24/99 <b>ARC 8817A</b>	Conference Room 200 E. Grand Ave. Des Moines, Iowa	April 13, 1999 1:30 p.m.
<b>CIVIL RIGHTS COMMISSION[161]</b>		
Agency procedures, 1.2, 1.4, 4.1 to 4.33 IAB 3/24/99 <b>ARC 8808A</b>	Conference Room—2nd Floor 211 E. Maple St. Des Moines, Iowa	April 13, 1999 1 p.m.
<b>COMMUNITY ACTION AGENCIES DIVISION[427]</b>		
Agency procedures, chs 3, 4, 6, 7 IAC 3/24/99 <b>ARC 8795A</b>	Director's Conference Room Lucas State Office Bldg. Des Moines, Iowa	April 13, 1999 10 a.m.
<b>CREDIT UNION DIVISION[189]</b>		
Agency procedures, 4.2, 4.3, chs 20 to 22 IAB 3/24/99 <b>ARC 8858A</b>	Conference Room 200 E. Grand Ave., Suite 370 Des Moines, Iowa	April 13, 1999 10 a.m.
<b>CRIMINAL AND JUVENILE JUSTICE PLANNING DIVISION[428]</b>		
Juvenile accountability incentive block grant program (JAIBG), ch 5 IAB 3/10/99 <b>ARC 8739A</b> (See also ARC 8740A)	Hearing Room 2—1st Floor Lucas State Office Bldg. Des Moines, Iowa	March 31, 1999 9 a.m.
Agency procedures, chs 6 to 8 IAB 3/24/99 <b>ARC 8802A</b>	Director's Conference Room Lucas State Office Bldg. Des Moines, Iowa	April 13, 1999 10 a.m.

**CULTURAL AFFAIRS DEPARTMENT[221]**

Agency procedures, 1.1, 1.2, 1.4 to 1.7, chs 3, 4 IAB 3/24/99 ARC 8839A	Director's Conference Room 600 E. Locust St. Des Moines, Iowa	April 13, 1999 1 p.m.
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**DENTAL EXAMINERS BOARD[650]**

Declaratory orders, 7.3, ch 9 IAB 3/24/99 ARC 8829A	Conference Room—2nd Floor Executive Hills West 1209 E. Court Ave. Des Moines, Iowa	April 21, 1999 1 p.m.
Continuing education, 25.2(10) IAB 3/24/99 ARC 8827A	Conference Room—2nd Floor Executive Hills West 1209 E. Court Ave. Des Moines, Iowa	April 21, 1999 1 p.m.
Complaints, 31.5 to 31.15 IAB 3/24/99 ARC 8828A	Conference Room—2nd Floor Executive Hills West 1209 E. Court Ave. Des Moines, Iowa	April 21, 1999 1 p.m.
Contested cases, ch 51 IAB 3/24/99 ARC 8826A	Conference Room—2nd Floor Executive Hills West 1209 E. Court Ave. Des Moines, Iowa	April 21, 1999 1 p.m.

**ECONOMIC DEVELOPMENT, IOWA DEPARTMENT OF[261]**

Iowa community development block grant nonentitlement program, 23.14, 23.15 IAB 3/10/99 ARC 8762A	Main Conference Room 200 E. Grand Ave. Des Moines, Iowa	March 30, 1999 1 p.m.
Local housing assistance program, 28.9(3) IAB 3/10/99 ARC 8763A	Main Conference Room 200 E. Grand Ave. Des Moines, Iowa	March 30, 1999 2 p.m.
Community economic betterment program, 53.2, 53.6, 53.7, 53.9 to 53.16 IAB 3/10/99 ARC 8764A	Business Finance Conference Room First Floor 200 E. Grand Ave. Des Moines, Iowa	March 30, 1999 1:30 p.m.

**EDUCATION DEPARTMENT[281]**

Agency procedure for rule making, ch 2 IAB 3/10/99 ARC 8737A	State Board Room Grimes State Office Bldg. Des Moines, Iowa	March 31, 1999 9 a.m.
Declaratory orders, ch 3 IAB 3/10/99 ARC 8736A	State Board Room Grimes State Office Bldg. Des Moines, Iowa	March 31, 1999 11 a.m.
Appeal procedures, 6.1 to 6.22 IAB 3/10/99 ARC 8735A	State Board Room Grimes State Office Bldg. Des Moines Iowa	March 31, 1999 10 a.m.

**ELDER AFFAIRS DEPARTMENT[321]**

Agency procedures, 2.7, chs 13, 18, 28 IAB 3/24/99 ARC 8854A	North Conference Room Clemens Bldg. 200 10th St. Des Moines, Iowa	April 13, 1999 10 a.m.
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**ENVIRONMENTAL PROTECTION COMMISSION[567]**

Air pollution, amendments to chs 20 to 23, 25 IAB 3/10/99 ARC 8744A	East Conference Room Air Quality Bureau 7900 Hickman Ave., Suite 1 Urbandale, Iowa	April 9, 1999 1 p.m.
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**HUMAN RIGHTS DEPARTMENT[421]**

Agency procedures, 2.1, 2.3(1), 2.6, chs 3 to 6 IAB 3/24/99 ARC 8814A	Director's Conference Room Lucas State Office Bldg. Des Moines, Iowa	April 13, 1999 10 a.m.
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**INSURANCE DIVISION[191]**

Agency procedures, chs 2 to 4 IAB 3/24/99 ARC 8836A	340 E. Maple St. Des Moines, Iowa	April 16, 1999 10 a.m.
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**LABOR SERVICES DIVISION[875]**

Agency procedures, amendments to ch 1, 150.11(4), 150.15, 202.9; rescind ch 300 IAB 3/24/99 ARC 8847A	1000 E. Grand Ave. Des Moines, Iowa	April 19, 1999 1 p.m. (If requested)
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**LATINO AFFAIRS DIVISION[433]**

Agency procedures, chs 3 to 5, 7 IAB 3/24/99 ARC 8825A	Director's Conference Room Lucas State Office Bldg. Des Moines, Iowa	April 13, 1999 10 a.m.
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**LAW ENFORCEMENT ACADEMY[501]**

Agency procedures, 6.2(2), rescind 6.3, 6.4; chs 14, 15 IAB 3/24/99 ARC 8830A	Law Enforcement Academy Library Camp Dodge Johnston, Iowa	April 13, 1999 10 a.m.
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**LOTTERY DIVISION[705]**

Prize payment; agency procedures, 1.29, 2.16, amendments to ch 6, ch 7, 13.23, ch 14 IAB 3/24/99 ARC 8856A	2015 Grand Ave. Des Moines, Iowa	April 15, 1999 9 a.m.
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**NATURAL RESOURCE COMMISSION[571]**

Game management areas, 51.5(2), 51.9 IAB 3/10/99 ARC 8747A	State Forest Nursery 2404 S. Duff Ames, Iowa	April 17, 1999 10 a.m.
Wildlife refuges—Chichaqua and Cottonwood, 52.1(2) IAB 3/10/99 ARC 8748A	State Forest Nursery 2404 S. Duff Ames, Iowa	April 17, 1999 10 a.m.
Waterfowl and coot hunting, 91.1, 91.3, 91.4(2), 91.6 IAB 3/10/99 ARC 8746A	State Forest Nursery 2404 S. Duff Ames, Iowa	April 17, 1999 10 a.m.
Wild turkey fall hunting, 99.2(1), 99.5 IAB 3/10/99 ARC 8743A	State Forest Nursery 2404 S. Duff Ames, Iowa	April 17, 1999 10 a.m.
Deer hunting, 106.2(4), 106.8(2), 106.10(6) IAB 3/10/99 ARC 8749A	State Forest Nursery 2404 S. Duff Ames, Iowa	April 17, 1999 10 a.m.

**PERSONNEL DEPARTMENT[581]**

Declaratory orders; IPERS; contested cases; procedures for rule making, 19.2 to 19.16, 21.9(5), chs 26, 31 IAB 3/10/99 ARC 8756A	North Conference Room Personnel Dept. Grimes State Office Bldg. Des Moines, Iowa	March 30, 1999 2 p.m.
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**PHARMACY EXAMINERS BOARD[657]**

Waivers or variances from rules, 1.3 IAB 3/10/99 ARC 8770A (See also ARC 8411A, IAB 10/21/98)	East Conference Room—2nd Floor Executive Hills West 1209 E. Court Ave. Des Moines, Iowa	March 31, 1999 1 p.m.
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**PROFESSIONAL LICENSURE DIVISION[645]**

Agency procedures, chs 6 to 9, 11 to 17 IAB 3/24/99 ARC 8834A	Conference Room—5th Floor Lucas State Office Bldg. Des Moines, Iowa	April 15, 1999 9 to 11 a.m.
Chiropractic examiners, 40.21 to 40.35; rescind 40.47 and chs 41, 42, 49 IAB 3/24/99 ARC 8833A	Conference Room—5th Floor Lucas State Office Bldg. Des Moines, Iowa	April 15, 1999 9 to 11 a.m.
Cosmetology, 60.2(4), 60.3, 60.4, 60.13(1) IAB 3/10/99 ARC 8754A (See also ARC 8629A, IAB 1/27/99) (ICN Network)	ICN Room—6th Floor Lucas State Office Bldg. Des Moines, Iowa	April 1, 1999 9 to 11 a.m.
	ICN Room Loess Hills AEA 13 24997 Hwy. 92 Council Bluffs, Iowa	April 1, 1999 9 to 11 a.m.

<b>PROFESSIONAL LICENSURE DIVISION[645] (ICN Network) (Cont'd)</b>	Library Room 206 Iowa Central Community College 330 Ave. M Fort Dodge, Iowa	April 1, 1999 9 to 11 a.m.
	ICN Classroom Southern Prairie AEA 15 2814 N. Court St. Ottumwa, Iowa	April 1, 1999 9 to 11 a.m.
	Room 110, Tama Hall Hawkeye Community College 1501 E. Orange Rd. Waterloo, Iowa	April 1, 1999 9 to 11 a.m.
Mortuary science examiners, 101.3 IAB 3/10/99 <b>ARC 8751A</b>	Board Conference Room—5th Floor Lucas State Office Bldg. Des Moines, Iowa	April 1, 1999 9 to 11 a.m.
Psychology examiners, 240.200 to 240.300; rescind chs 241, 242, 249 IAB 3/24/99 <b>ARC 8840A</b>	Conference Room—5th Floor Lucas State Office Bldg. Des Moines, Iowa	April 15, 1999 9 to 11 a.m.
Social work examiners, amendments to ch 280; rescind chs 281 to 285, 289 IAB 3/24/99 <b>ARC 8832A</b>	Board Room—5th Floor Lucas State Office Bldg. Des Moines, Iowa	April 14, 1999 9 to 11 a.m.
Speech pathology and audiology examiners, ch 300, 301.2, 301.4(1), 301.5 to 301.10 IAB 3/10/99 <b>ARC 8752A</b>	South Conference Room 2—5th Floor Lucas State Office Bldg. Des Moines, Iowa	March 30, 1999 9 to 11 a.m.
Athletic training examiners, 350.22 to 350.30; rescind chs 355 to 358 IAB 3/24/99 <b>ARC 8831A</b>	Conference Room—5th Floor Lucas State Office Bldg. Des Moines, Iowa	April 15, 1999 9 to 11 a.m.
<b>PUBLIC EMPLOYMENT RELATIONS BOARD[621]</b>		
General provisions; hearing and impasse procedures; declaratory rulings; public records and fair information practices, 1.5, 1.6(7), 1.7, 2.2, 2.3, 2.20, 2.21, 7.7(5), 10.1 to 10.10, 12.13(3) IAB 3/10/99 <b>ARC 8758A</b>	Board Hearing Room—2nd Floor 514 E. Locust St. Des Moines, Iowa	March 30, 1999 11 a.m.
<b>PUBLIC SAFETY DEPARTMENT[661]</b>		
Breath testing devices, 7.2(3) IAB 3/24/99 <b>ARC 8796A</b>	Conference Room—3rd Floor West Half Wallace State Office Bldg. Des Moines, Iowa	April 19, 1999 9:30 a.m.

**PUBLIC SAFETY  
DEPARTMENT[661]  
(Cont'd)**

Agency procedures, ch 10 IAB 3/24/99 ARC 8855A	Conference Room—3rd Floor West Half Wallace State Office Bldg. Des Moines, Iowa	April 19, 1999 9 a.m.
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**RACING AND GAMING COMMISSION[491]**

Rule making and declaratory orders, ch 2 IAB 3/24/99 ARC 8810A	IMTA Auditorium (next to Racing and Gaming Office) 717 E. Court, Suite B Des Moines, Iowa	April 13, 1999 9 a.m.
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**REAL ESTATE COMMISSION[193E]**

Agency procedures, 1.23, 1.42, chs 4, 7 IAB 3/24/99 ARC 8792A	Conference Room—2nd Floor Dept. of Commerce Bldg. 1918 S.E. Hulsizer Ankeny, Iowa	April 13, 1999 9 a.m.
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**SECRETARY OF STATE[721]**

Constitutional amendment, 21.200(5) IAB 3/24/99 ARC 8843A	Office of Secretary of State Second Floor Hoover State Office Bldg. Des Moines, Iowa	April 13, 1999 1:30 p.m.
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**SOIL CONSERVATION DIVISION[27]**

Agency procedures, chs 3 to 5 IAB 3/24/99 ARC 8815A	Conference Room—1st Floor East Half Wallace State Office Bldg. Des Moines, Iowa	April 13, 1999 10 a.m.
Water protection, 12.51, 12.72, 12.76 IAB 3/10/99 ARC 8759A	Conference Room—3rd Floor West Half Wallace State Office Bldg. Des Moines, Iowa	March 30, 1999 10 a.m.

**STATUS OF WOMEN DIVISION[435]**

Agency procedures, chs 7 to 9 IAB 3/24/99 ARC 8816A	Director's Conference Room Lucas State Office Bldg. Des Moines, Iowa	April 13, 1999 10 a.m.
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**TRANSPORTATION DEPARTMENT[761]**

Logo signing, 118.2 to 118.6 IAB 3/24/99 ARC 8789A	Commission Conference Room 800 Lincoln Way Ames, Iowa	April 15, 1999 10 a.m. (If requested)
Vehicle registration and certificate of title, 400.60(1) IAB 3/24/99 ARC 8794A	Conference Room—Lower Level Park Fair Mall 100 Euclid Ave. Des Moines, Iowa	April 15, 1999 10 a.m. (If requested)

**TREASURER OF STATE[781]**

Agency procedures, chs 17, 18 IAB 3/24/99 ARC 8835A	Office of Treasurer of State—1st Floor State Capitol Bldg. Des Moines, Iowa	April 16, 1999 9 a.m.
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**VETERINARY MEDICINE BOARD[811]**

Agency procedures, chs 3, 4, 10 IAB 3/24/99 ARC 8820A	Conference Room—1st Floor Wallace State Office Bldg. Des Moines, Iowa	April 16, 1999 2:30 p.m.
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**WORKFORCE DEVELOPMENT BOARD/SERVICES DIVISION[877]**

Criticism of agency rule, 2.3 IAB 3/10/99 ARC 8732A	Director's Conference Room 1000 E. Grand Ave. Des Moines, Iowa	March 30, 1999 10 a.m.
Petition for declaratory order, 26.2 IAB 3/10/99 ARC 8731A	Director's Conference Room 1000 E. Grand Ave. Des Moines, Iowa	March 30, 1999 10 a.m.

**WORKFORCE DEVELOPMENT DEPARTMENT[871]**

Organizational changes, 1.1(6), 2.1(2), 2.4(4), 2.5, 2.7(2), 2.8 IAB 3/24/99 ARC 8809A	Director's Conference Room 1000 E. Grand Ave. Des Moines, Iowa	April 16, 1999 10:30 a.m. (If requested)
Agency procedures, 43.5, amendments to ch 44 IAB 3/24/99 ARC 8849A	1000 E. Grand Ave. Des Moines, Iowa	April 13, 1999 9:30 a.m.

Due to reorganization of state government by 1986 Iowa Acts, chapter 1245, it was necessary to revise the agency identification numbering system, i.e., the bracketed number following the agency name.

“Umbrella” agencies and elected officials are set out below at the left-hand margin in CAPITAL letters.

Divisions (boards, commissions, etc.) are indented and set out in lowercase type under their statutory “umbrellas.”

Other autonomous agencies which were not included in the original reorganization legislation as “umbrella” agencies are included alphabetically in small capitals at the left-hand margin, e.g., BEEF INDUSTRY COUNCIL, IOWA[101].

The following list will be updated as changes occur:

AGRICULTURE AND LAND STEWARDSHIP DEPARTMENT[21]

Agricultural Development Authority[25]

Soil Conservation Division[27]

ATTORNEY GENERAL[61]

AUDITOR OF STATE[81]

BEEF INDUSTRY COUNCIL, IOWA[101]

BLIND, DEPARTMENT FOR THE[111]

CITIZENS' AIDE[141]

CIVIL RIGHTS COMMISSION[161]

COMMERCE DEPARTMENT[181]

Alcoholic Beverages Division[185]

Banking Division[187]

Credit Union Division[189]

Insurance Division[191]

Professional Licensing and Regulation Division[193]

Accountancy Examining Board[193A]

Architectural Examining Board[193B]

Engineering and Land Surveying Examining Board[193C]

Landscape Architectural Examining Board[193D]

Real Estate Commission[193E]

Real Estate Appraiser Examining Board[193F]

Savings and Loan Division[197]

Utilities Division[199]

CORRECTIONS DEPARTMENT[201]

Parole Board[205]

CULTURAL AFFAIRS DEPARTMENT[221]

Arts Division[222]

Historical Division[223]

ECONOMIC DEVELOPMENT, IOWA DEPARTMENT OF[261]

City Development Board[263]

Iowa Finance Authority[265]

EDUCATION DEPARTMENT[281]

Educational Examiners Board[282]

College Student Aid Commission[283]

Higher Education Loan Authority[284]

Iowa Advance Funding Authority[285]

Libraries and Information Services Division[286]

Public Broadcasting Division[288]

School Budget Review Committee[289]

EGG COUNCIL[301]

ELDER AFFAIRS DEPARTMENT[321]

EMPOWERMENT BOARD, IOWA[349]

ETHICS AND CAMPAIGN DISCLOSURE BOARD, IOWA[351]

EXECUTIVE COUNCIL[361]

FAIR BOARD[371]

GENERAL SERVICES DEPARTMENT[401]

HUMAN INVESTMENT COUNCIL[417]

HUMAN RIGHTS DEPARTMENT[421]

Community Action Agencies Division[427]

Criminal and Juvenile Justice Planning Division[428]

Deaf Services Division[429]

Persons With Disabilities Division[431]

Latino Affairs Division[433]

Status of Blacks Division[434]

Status of Women Division[435]

HUMAN SERVICES DEPARTMENT[441]

INSPECTIONS AND APPEALS DEPARTMENT[481]  
  Employment Appeal Board[486]  
  Foster Care Review Board[489]  
  Racing and Gaming Commission[491]  
  State Public Defender[493]  
LAW ENFORCEMENT ACADEMY[501]  
LIVESTOCK HEALTH ADVISORY COUNCIL[521]  
MANAGEMENT DEPARTMENT[541]  
  Appeal Board, State[543]  
  City Finance Committee[545]  
  County Finance Committee[547]  
NARCOTICS ENFORCEMENT ADVISORY COUNCIL[551]  
NATIONAL AND COMMUNITY SERVICE, IOWA COMMISSION ON[555]  
NATURAL RESOURCES DEPARTMENT[561]  
  Energy and Geological Resources Division[565]  
  Environmental Protection Commission[567]  
  Natural Resource Commission[571]  
  Preserves, State Advisory Board[575]  
PERSONNEL DEPARTMENT[581]  
PETROLEUM UNDERGROUND STORAGE TANK FUND  
  BOARD, IOWA COMPREHENSIVE[591]  
PREVENTION OF DISABILITIES POLICY COUNCIL[597]  
PUBLIC DEFENSE DEPARTMENT[601]  
  Emergency Management Division[605]  
  Military Division[611]  
PUBLIC EMPLOYMENT RELATIONS BOARD[621]  
PUBLIC HEALTH DEPARTMENT[641]  
  Substance Abuse Commission[643]  
  Professional Licensure Division[645]  
  Dental Examiners Board[650]  
  Medical Examiners Board[653]  
  Nursing Board[655]  
  Pharmacy Examiners Board[657]  
PUBLIC SAFETY DEPARTMENT[661]  
RECORDS COMMISSION[671]  
REGENTS BOARD[681]  
  Archaeologist[685]  
REVENUE AND FINANCE DEPARTMENT[701]  
  Lottery Division[705]  
SECRETARY OF STATE[721]  
SEED CAPITAL CORPORATION, IOWA[727]  
SHEEP AND WOOL PROMOTION BOARD, IOWA[741]  
TELECOMMUNICATIONS AND TECHNOLOGY COMMISSION, IOWA[751]  
TRANSPORTATION DEPARTMENT[761]  
  Railway Finance Authority[765]  
TREASURER OF STATE[781]  
UNIFORM STATE LAWS COMMISSION[791]  
VETERANS AFFAIRS COMMISSION[801]  
VETERINARY MEDICINE BOARD[811]  
VOTER REGISTRATION COMMISSION[821]  
WORKFORCE DEVELOPMENT DEPARTMENT[871]  
  Labor Services Division[875]  
  Workers' Compensation Division[876]  
  Workforce Development Board and  
  Workforce Development Center Administration Division[877]

ARC 8788A

ACCOUNTANCY EXAMINING BOARD[193A]

Notice of Intended Action

Twenty-five interested persons, a governmental subdivision, an agency or association of 25 or more persons may demand an oral presentation hereon as provided in Iowa Code section 17A.4(1)"b."

Notice is also given to the public that the Administrative Rules Review Committee may, on its own motion or on written request by any individual or group, review this proposed action under section 17A.8(6) at a regular or special meeting where the public or interested persons may be heard.

Pursuant to the authority of Iowa Code section 542C.3, the Accountancy Examining Board hereby gives Notice of Intended Action to amend Chapter 1, "Definitions," and Chapter 2, "Organization and Administration," to rescind Chapter 12, "Procedure for Enforcement," Iowa Administrative Code, and to adopt a new chapter with the same title.

Chapter 12 is rescinded and replaced by a new chapter which implements changes to the Uniform Rules on Agency Procedure required by the Iowa Administrative Procedure Act as a result of 1998 Iowa Acts, chapter 1202, and the amendments to Chapters 1 and 2 include changes required by 1998 Iowa Acts, chapter 1202, as well.

Consideration will be given to all written suggestions or comments on the proposed amendments received on or before April 13, 1999. Comments should be addressed to Glenda Loving, Accountancy Examining Board, 1918 S.E. Hulsizer, Ankeny, Iowa 50021, or faxed to (515)281-7411. E-mail may be sent to glenda.loving@comm7.state.ia.us.

These amendments are intended to implement Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202, and chapters 272C and 544A.

The following amendments are proposed.

ITEM 1. Amend 193A—1.1(542C) by adopting new definitions in alphabetical order as follows:

"Issuance" means the date of mailing of a decision or order or date of delivery if service is by other means unless another date is specified in the order.

"Proposed decision" means the presiding officer's recommended findings of fact, conclusions of law, decision, and order on a contested case in which the board did not preside.

ITEM 2. Rescind rules 193A—2.17(17A) to 193A—2.23(17A) and insert in lieu thereof the following new rules 193A—2.17(17A) through 193A—2.28(17A):

193A—2.17(17A) Petition for declaratory order. Any person may file a petition with the board for a declaratory order as to the applicability to specified circumstances of a statute, rule, or order within the primary jurisdiction of the board at the board's offices. A petition is deemed filed when it is received by that office. The board shall provide the petitioner with a file-stamped copy of the petition if the petitioner provides the board an extra copy for this purpose. The petition must be typewritten or legibly handwritten in ink and must substantially conform to the following form:

ACCOUNTANCY EXAMINING BOARD

Petition by (Name of Petitioner) for a Declaratory Order on (Cite provisions of law involved). PETITION FOR DECLARATORY ORDER

The petition must provide the following information:

- 1. A clear and concise statement of all relevant facts on which the order is requested.
2. A citation and the relevant language of the specific statutes, rules, policies, decisions, or orders whose applicability is questioned, and any other relevant law.
3. The questions the petitioner wants answered, stated clearly and concisely.
4. The answers to the questions desired by the petitioner and a summary of the reasons urged by the petitioner in support of those answers.
5. The reasons for requesting the declaratory order and disclosure of the petitioner's interest in the outcome.
6. A statement indicating whether the petitioner is currently a party to another proceeding involving the questions at issue and whether, to the petitioner's knowledge, those questions have been directed by, are pending determination by, or are under investigation by, any governmental entity.
7. The names and addresses of other persons, or a description of any class of persons, known by petitioner to be affected by, or interested in, the questions in the petition.
8. Any request by petitioner for a meeting provided for by 2.23(17A).

The petition must be dated and signed by the petitioner or the petitioner's representative. It must also include the name, mailing address, and telephone number of the petitioner and petitioner's representative, and a statement indicating the person to whom communications concerning the petition should be directed.

193A—2.18(17A) Notice of petition. Within ten days after receipt of a petition for a declaratory order, the board shall give notice of the petition to all persons not served by the petitioner pursuant to 2.22(17A) to whom notice is required by any provision of law. The board may also give notice to any other persons.

193A—2.19(17A) Intervention.

2.19(1) Persons who qualify under any applicable provision of law as an intervenor and who file a petition for intervention within 20 days of the filing of a petition for declaratory order shall be allowed to intervene in a proceeding for a declaratory order.

2.19(2) Any person who files a petition for intervention at any time prior to the issuance of an order may be allowed to intervene in a proceeding for a declaratory order at the discretion of the board.

2.19(3) A petition for intervention shall be filed at the board's offices. Such a petition is deemed filed when it is received by that office. The board will provide the petitioner with a file-stamped copy of the petition for intervention if the petitioner provides an extra copy for this purpose. A petition for intervention must be typewritten or legibly handwritten in ink and must substantially conform to the following form:

ACCOUNTANCY EXAMINING BOARD

Petition by (Name of Original Petitioner) for a Declaratory Order on (Cite provisions of law cited in original petition). PETITION FOR INTERVENTION

The petition for intervention must provide the following information:

- 1. Facts supporting the intervenor's standing and qualifications for intervention.

## ACCOUNTANCY EXAMINING BOARD[193A](cont'd)

2. The answers urged by the intervenor to the question or questions presented and a summary of the reasons urged in support of those answers.

3. Reasons for requesting intervention and disclosure of the intervenor's interest in the outcome.

4. A statement indicating whether the intervenor is currently a party to any proceeding involving the questions at issue and whether, to the intervenor's knowledge, those questions have been decided by, are pending determination by, or are under investigation by, any governmental entity.

5. The names and addresses of any additional persons, or a description of any additional class of persons, known by the intervenor to be affected by, or interested in, the questions presented.

6. Whether the intervenor consents to be bound by the determination of the matters presented in the declaratory order proceeding.

The petition must be dated and signed by the intervenor or the intervenor's representative. It must also include the name, mailing address, and telephone number of the intervenor and intervenor's representative, and a statement indicating the person to whom communications should be directed.

**193A—2.20(17A) Briefs.** The petitioner or intervenor may file a brief in support of the position urged. The board may request a brief from the petitioner, any intervenor, or any other person concerning the questions raised in the petition.

**193A—2.21(17A) Inquiries.** Inquiries concerning the status of a declaratory order may be made to the executive secretary of the board at the board's offices.

**193A—2.22(17A) Service and filing of petitions and other papers.**

**2.22(1)** When service required. Except where otherwise provided by law, every petition for declaratory order, petition for intervention, brief, or other paper filed in a proceeding for a declaratory order shall be served upon each of the parties of record to the proceeding, and on all other persons identified in the petition for declaratory order or petition for intervention as affected by or interested in the questions presented, simultaneously with its filing. The party filing a document is responsible for service on all parties and other affected or interested persons.

**2.22(2)** Filing—when required. All petitions for declaratory orders, petitions for intervention, briefs, or other papers in a proceeding for a declaratory order shall be filed with the board at the board's offices. All petitions, briefs, or other papers that are required to be served upon a party shall be filed simultaneously with the board.

**2.22(3)** Method of service, time of filing, and proof of mailing. Method of service, time of filing, and proof of mailing shall be as provided by 193A—subrule 12.10(2).

**193A—2.23(17A) Board consideration.** Upon request by petitioner, the board must schedule a brief and informal meeting between the original petitioner, all intervenors, and the board, a member of the board, or a member of the staff of the board to discuss the questions raised. The board may solicit comments from any person on the questions raised. Also, comments on the questions raised may be submitted to the board by any person.

**193A—2.24(17A) Action on petition.**

**2.24(1)** Within the time allowed by 1998 Iowa Acts, chapter 1202, section 13(5), after receipt of a petition for a declaratory order, the board shall take action on the petition within 30 days after receipt as required by 1998 Iowa Acts, Chapter 1202, section 13(5).

**2.24(2)** The date of issuance of an order or of a refusal to issue an order is as defined in 193A—1.1(542C).

**193A—2.25(17A) Refusal to issue order.** The board shall not issue a declaratory order where prohibited by 1998 Iowa Acts, chapter 1202, section 13(1), and may refuse to issue a declaratory order on some or all questions raised for the following reasons:

1. The petition does not substantially comply with the required form.

2. The petition does not contain facts sufficient to demonstrate that the petitioner will be aggrieved or adversely affected by the failure of the board to issue an order.

3. The board does not have jurisdiction over the questions presented in the petition.

4. The questions presented by the petition are also presented in a current rule making, contested case, or other board or judicial proceeding that may definitively resolve them.

5. The questions presented by the petition would more properly be resolved in a different type of proceeding or by another body with jurisdiction over the matter.

6. The facts or questions presented in the petition are unclear, overbroad, insufficient, or otherwise inappropriate as a basis upon which to issue an order.

7. There is no need to issue an order because the questions raised in the petition have been settled due to a change in circumstances.

8. The petition is not based upon facts calculated to aid in the planning of future conduct but is, instead, based solely upon prior conduct in an effort to establish the effect of that conduct or to challenge a board decision already made.

9. The petition requests a declaratory order that would necessarily determine the legal rights, duties, or responsibilities of other persons who have not joined in the petition or filed a similar petition and whose position on the questions presented may fairly be presumed to be adverse to that of petitioner.

10. The petitioner requests the board to determine whether a statute is unconstitutional on its face.

**2.25(1)** A refusal to issue a declaratory order must indicate the specific grounds for the refusal and constitutes final board action on the petition.

**2.25(2)** Refusal to issue a declaratory order pursuant to this provision does not preclude the filing of a new petition that seeks to eliminate the grounds for refusal to issue an order.

**193A—2.26(17A) Contents of declaratory order—effective date.** In addition to the order itself, a declaratory order must contain the date of its issuance, the names of petitioner and all intervenors, the specific statutes, rules, policies, decisions, or orders involved, the particular facts upon which it is based, and the reasons for its conclusion. A declaratory order is effective on the date of issuance.

**193A—2.27(17A) Copies of orders.** A copy of all orders issued in response to a petition for a declaratory order shall be mailed promptly to the original petitioner and all intervenors.

**193A—2.28(17A) Effect of a declaratory order.** A declaratory order has the same status and binding effect as a final order in a contested case proceeding. It is binding on the board, the petitioner and any intervenors and is applicable only in circumstances where the relevant facts and the law involved are indistinguishable from those on which the order was based. As to all other persons, a declaratory order serves only as precedent and is not binding on the board. The is-

## ACCOUNTANCY EXAMINING BOARD[193A](cont'd)

suance of a declaratory order constitutes final board action on the petition.

ITEM 3. Rescind 193A—Chapter 12 and adopt the following new chapter in lieu thereof:

**CHAPTER 12  
PROCEDURE FOR ENFORCEMENT**

**193A—12.1(272C,542C) Compliance.** The board is empowered to administer Iowa Code chapters 17A, 272C and 542C and the related administrative rules for the protection and well-being of those persons who may rely upon individuals and firms for the performance of public accounting services within the state.

**193A—12.2(272C,542C) Complaints.**

**12.2(1)** The board may consider, but is not limited to, the following in determining whether a disciplinary violation may have occurred:

a. Periodic reviews of financial statements submitted to or filed with state and local government agencies in the state of Iowa, which are conducted as part of the board's positive enforcement program.

b. News articles from any source.

c. Reports required to be filed by CPAs and APs under the provisions of rules 193A—15.1(542C) and 15.2(542C). Such reports shall meet the requirements of paragraph 12.2(1)"e."

d. Reports filed with the board by the commissioner of insurance as required by Iowa Code section 272C.4(9).

e. Complaints filed with the board by any member of the public. Such complaints shall be in writing and shall include the following:

(1) The full name, address, and telephone number of the complainant.

(2) The full name, address, and telephone number of the licensee.

(3) A statement of the facts concerning the alleged disciplinary violation.

f. Reports to the board from any regulatory or law enforcement agency from any jurisdiction.

**12.2(2)** As provided by Iowa Code section 272C.8, a person shall not be civilly liable as a result of filing a report or complaint with the board unless such act is done with malice, nor shall an employee be dismissed from employment or discriminated against by an employer for filing such a report or complaint.

**193A—12.3(272C,542C) Conflict of interest.** If the subject of a complaint is a member of the board, or if a member of the board has a conflict of interest in any disciplinary matter before the board, that member shall abstain from participation in any consideration of the complaint and from participation in any disciplinary hearing that may result from the complaint.

**193A—12.4(272C,542C) Grounds for disciplinary action.** The board may initiate disciplinary action against a CPA, AP, or a firm of CPAs or APs, on any of the following grounds:

**12.4(1)** For any of the grounds set forth in Iowa Code section 542C.21.

a. A violation of any of the rules of professional conduct set forth in 193A—Chapter 11 is grounds for disciplinary action under Iowa Code section 542C.21(4).

b. When considering alleged violations of Iowa Code section 542C.21(11), the phrase "conduct discreditable to

the public accounting profession" shall be construed in light of the following:

The reliance of the public in general and of the business community in particular on sound financial reporting, and on the implication of professional competence which inheres in the authorized use of a legally restricted title relating to the practice of public accountancy, imposes on a CPA or AP engaged in such practice certain obligations both to their clients and the public. These obligations include the obligation to maintain independence of thought and action, to strive continuously to improve one's professional skills, to observe, where applicable, generally accepted auditing standards, to promote sound and informative financial reporting, to hold the affairs of clients in confidence, to uphold the standards of the public accountancy profession, and to maintain high standards of personal conduct in all matters affecting one's fitness to practice public accountancy.

Habitual intoxication or addiction to the use of drugs will be considered as not maintaining a high standard of personal or professional conduct.

**12.4(2)** For a violation of any of the provisions of Iowa Code section 542C.22.

**12.4(3)** For a violation of any of the provisions of Iowa Code section 542C.25.

**12.4(4)** For a violation of Iowa Code subsection 272C.9(2) or 272C.9(3) and any of the provisions of 193A—Chapter 15.

**12.4(5)** For any of the grounds set forth in Iowa Code section 272C.10.

**12.4(6)** For failure to comply with an order of the board imposing licensee discipline.

**193A—12.5(272C,542C) Investigation of complaints.**

**12.5(1)** When the board receives information pursuant to rule 12.2(272C,542C) that indicates a CPA, AP, or firm of CPAs or APs may have committed an act that is grounds for disciplinary action, it shall be referred to the ethics and enforcement committee.

**12.5(2)** Confidentiality of complaint and investigative information. All complaint and investigative information received by the board shall be confidential pursuant to Iowa Code section 272C.6(4). Such information shall not be released to any person except as provided in that section.

**12.5(3)** Upon receipt of such a complaint, the committee shall determine whether a violation may have occurred. If the facts presented constitute a basis for disciplinary action, the committee shall open a disciplinary case against the licensee and investigate the case. If the committee concludes that the complaint does not present facts which constitute a basis for disciplinary action, the committee shall take no further action.

**12.5(4)** After a disciplinary case has been opened, the committee shall examine the information submitted to determine whether there is probable cause to believe a disciplinary violation has occurred or if additional information is required before it can make such a determination.

**12.5(5)** If additional information is considered necessary, the committee may assign an investigator to conduct further investigation. Alternatively, the committee may request the department of inspections and appeals to conduct an investigation of the complaint.

**12.5(6)** In connection with the investigation of a complaint, the board is authorized by law to subpoena books, papers, records, and any other real evidence, whether or not privileged or confidential under law, to help it determine whether it should institute a contested case proceeding (dis-

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ciplinary hearing). In the event a party refuses to obey a subpoena, the board may petition the court for its enforcement.

**12.5(7)** Upon completion of the investigation, the investigator or the department of inspections and appeals shall present a report to the committee. The committee shall review the report and determine what further action is necessary. The committee may:

- a. Order the matter be further investigated.
- b. Allow the licensee who is the subject of the complaint an opportunity to appear before the committee for an informal discussion regarding the circumstances of the alleged violation.
- c. Determine there is not probable cause to believe a disciplinary violation has occurred, and close the case.
- d. Determine there is probable cause to believe that a disciplinary violation has occurred.

**12.5(8)** If the committee determines there is probable cause, the committee shall, subject to board approval:

- a. Seek an informal stipulation or settlement of the matter; or
- b. When applicable, take appropriate action under the provisions of Iowa Code section 542C.28 or 542C.29; or
- c. Commence a contested case proceeding by ordering that a statement of charges be filed against the licensee and a contested case hearing be scheduled.

**193A—12.6(272C,542C) Informal discussions.**

**12.6(1)** The licensee is not required to attend or participate in the informal discussion. By electing to attend, the licensee waives the right to seek disqualification based upon personal investigation of a board member or staff from participating in making a contested case decision or acting as a presiding officer in a later contested case hearing. The licensee is required to inform the board as to whether or not the licensee will attend the informal discussion.

**12.6(2)** Because an informal discussion constitutes a part of the committee's investigation of a pending disciplinary case, facts that are discussed at the informal discussion may be considered by the board in the event the matter proceeds to a contested case hearing and those facts are independently introduced into evidence.

**12.6(3)** The licensee may, but is not required to, be represented by an attorney at the informal discussion.

**12.6(4)** The informal discussion shall be held in closed session pursuant to Iowa Code section 21.2(2).

**12.6(5)** The committee may seek an informal stipulation or settlement of the case at the time of the informal discussion. If the parties agree to an informal settlement at the informal discussion, a statement of charges shall be filed simultaneously with the settlement document. In the event the committee does not reach a settlement under this rule, the settlement rules set forth in rule 12.7(272C,542C) are still applicable.

**12.6(6)** Consent to settlement negotiation by the licensee at an informal discussion constitutes a waiver of notice and opportunity to be heard pursuant to Iowa Code section 17A.17 as amended by 1998 Iowa Acts, chapter 1202, section 19, and rule 12.31(17A) to the extent applicable. Thereafter, but prior to the filing of a statement of charges against the licensee, the prosecuting attorney is authorized to discuss informal settlement with the committee.

**193A—12.7(272C,542C) Settlements.**

**12.7(1)** Settlement negotiations may also be initiated after a statement of charges is filed. Neither party is obligated to utilize this procedure to settle the case. Such negotiations may be initiated by the state of Iowa through the prosecuting

attorney, by the respondent, or by the board. The chair of the board, or another board member designated by the chair, shall have authority to negotiate on behalf of the board.

**12.7(2)** The board shall not be involved in negotiation until a written settlement signed by the licensee is submitted to the full board for approval.

**12.7(3)** Consent to settlement negotiation by the respondent constitutes a waiver of notice and opportunity to be heard pursuant to Iowa Code section 17A.17 as amended by 1998 Iowa Acts, chapter 1202, section 19, and rule 12.31(17A) during informal settlement negotiation. Thereafter, the prosecuting attorney is authorized to discuss informal settlement with the board chair or designee.

**12.7(4)** All informal settlement agreements are subject to the approval of a majority of the full board. No informal settlement shall be presented to the board for approval unless it is in final, written form executed by the respondent. If the board fails to approve the informal settlement, it shall be of no force or effect to either party.

**12.7(5)** The board member who participates in the negotiation of an informal settlement is not disqualified from participating in the adjudication of the contested case.

**193A—12.8(17A) Time requirements.**

**12.8(1)** Time shall be computed as provided in Iowa Code subsection 4.1(34).

**12.8(2)** For good cause, the presiding officer may extend or shorten the time to take any action, except as precluded by statute. Except for good cause stated in the record, before extending or shortening the time to take any action, the presiding officer shall afford all parties an opportunity to be heard or to file written arguments.

**193A—12.9(17A) Requests for contested case proceeding.** Any person claiming an entitlement to a contested case proceeding shall file a written request for such a proceeding within the time specified by the particular rules or statutes governing the subject matter or, in the absence of such law, the time specified in the board action in question.

The request for a contested case proceeding should state the name and address of the requester; identify the specified board action which is disputed and, where the requester is represented by a lawyer, identify the provisions of law or precedent requiring or authorizing the holding of a contested case proceeding in the particular circumstances involved; and include a short and plain statement of the issues of material fact in dispute.

**193A—12.10(272C,542C) Notice of contested case.**

**12.10(1)** Notice. The board's notice of hearing shall fix the time and place for hearing and shall contain those items specified in Iowa Code section 17A.12(2). The notice shall also contain the following:

- a. A statement of the time, place, and nature of the hearing;
- b. A statement of the legal authority and jurisdiction under which the hearing is to be held;
- c. A reference to the particular sections of the statutes and rules involved;
- d. A short and plain statement of the matters asserted. If the board or other party is unable to state the matters in detail at the time the notice is served, the initial notice may be limited to a statement of the issues involved. Thereafter, upon application, a more definite and detailed statement shall be furnished;
- e. Identification of all parties including the name, address and telephone number of the person who will act as ad-

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vocate for the board or the state and identification of parties' counsel where known;

f. Reference to the procedural rules governing conduct of the contested case proceeding;

g. Reference to the procedural rules governing informal settlement;

h. Identification of the presiding officer, if known. If not known, a description of who will serve as presiding officer (e.g., agency head, members of multimembered agency head, administrative law judge from the department of inspections and appeals); and

i. Notification of the time period in which a party may request, pursuant to 1998 Iowa Acts, chapter 1202, section 15(1), and rule 12.13(17A), that the presiding officer be an administrative law judge.

j. A statement requiring the respondent to submit an answer of the type specified in rule 12.11(272C,542C) within 20 days after receipt of the notice of hearing.

**12.10(2) Service.** The notice of hearing and the statement of charges shall be served on the respondent not less than 30 days prior to the date of hearing either personally or by mailing a copy by registered mail to the last-known address of the respondent.

a. For the purposes of this subrule, "registered mail" means that form of postal delivery, under postal regulations in effect at the time of service, which ensures that a mailing receipt and a record of delivery are obtained. "Registered mail" does not mean that form of postal delivery which provides only for protection against loss or damage, and does not ensure that a receipt and record of delivery are obtained.

b. In the event the respondent is a firm of CPAs or APs, service shall be made upon the managing partner, managing shareholder, or sole proprietor.

**12.10(3) Statement of charges.** The statement of charges shall set forth in ordinary and concise language the acts or omissions with which the respondent is charged and shall be in sufficient detail to enable the respondent to sufficiently prepare a defense. The statement of charges shall specify the statute(s) and any rule(s) which are alleged to have been violated and may also include additional information which the board deems appropriate.

**193A—12.11(272C,542C) Form of answer.** The answer shall contain the following information:

1. The name, address and telephone number of the respondent.

2. Specific statements regarding any or all allegations in the complaint which shall be in the form of admissions, denials, explanations, remarks or statements of mitigating circumstances.

3. Any additional facts or information the respondent deems relevant to the complaint and which may be of assistance in the ultimate determination of the case.

**193A—12.12(272C,542C) Legal representation.** Every statement of charges and notice of hearing prepared by the board shall be reviewed and approved by the office of the attorney general which shall be responsible for the legal representation of the public interest in all proceedings before the board. The assistant attorney general assigned to prosecute a contested case before the board shall not represent the board in that case but shall represent the public interest.

**193A—12.13(17A) Presiding officer.**

**12.13(1)** Any party who wishes to request that the presiding officer assigned to render a proposed decision be an administrative law judge employed by the department of inspections and appeals must file a written request within 20

days after service of a notice of hearing which identifies or describes the presiding officer as the board or a panel of the board.

**12.13(2)** The board may deny the request only upon a finding that one or more of the following apply:

a. Neither the board nor any officer of the board under whose authority the contested case is to take place is a named party to the proceeding or a real party in interest to that proceeding.

b. There is a compelling need to expedite issuance of a final decision in order to protect the public health, safety, or welfare.

c. The case involves a disciplinary hearing to be held by the board pursuant to Iowa Code section 272C.6.

d. The case involves significant policy issues of first impression that are inextricably intertwined with the factual issues presented.

e. The demeanor of the witnesses is likely to be dispositive in resolving the disputed factual issues.

f. Funds are unavailable to pay the costs of an administrative law judge and an interboard appeal.

g. The request was not timely filed.

h. The request is not consistent with a specified statute.

**12.13(3)** The board shall issue a written ruling specifying the grounds for its decision within 20 days after a request for an administrative law judge is filed.

**12.13(4)** Except as provided otherwise by another provision of law, all rulings by an administrative law judge acting as presiding officer are subject to appeal to the board. A party must seek any available intra-agency appeal in order to exhaust adequate administrative remedies.

**12.13(5)** Unless otherwise provided by law, agency heads and members of multimembered agency heads, when reviewing a proposed decision upon intra-agency appeal, shall have the powers of and shall comply with the provisions of this chapter which apply to presiding officers.

**193A—12.14(17A) Waiver of procedures.** Unless otherwise precluded by law, the parties in a contested case proceeding may waive any provision of this chapter. However, the board in its discretion may refuse to give effect to such a waiver when it deems the waiver to be inconsistent with the public interest.

**193A—12.15(17A) Telephone proceedings.** The presiding officer may resolve preliminary procedural motions by telephone conference in which all parties have an opportunity to participate. Other telephone proceedings may be held with the consent of all parties. The presiding officer will determine the location of the parties and witnesses for telephone hearings. The convenience of the witnesses or parties, as well as the nature of the case, will be considered when location is chosen.

**193A—12.16(17A) Disqualification.**

**12.16(1)** A presiding officer or other person shall withdraw from participation in the making of any proposed or final decision in a contested case if that person:

a. Has a personal bias or prejudice concerning a party or a representative of a party;

b. Has personally investigated, prosecuted or advocated, in connection with that case, the specific controversy underlying that case, another pending factually related contested case, or a pending factually related controversy that may culminate in a contested case involving the same parties;

c. Is subject to the authority, direction or discretion of any person who has personally investigated, prosecuted or advocated in connection with that contested case, the specif-

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ic controversy underlying that contested case, or a pending factually related contested case or controversy involving the same parties;

d. Has acted as counsel to any person who is a private party to that proceeding within the past two years;

e. Has a personal financial interest in the outcome of the case or any other significant personal interest that could be substantially affected by the outcome of the case;

f. Has a spouse or relative within the third degree of relationship that (1) is a party to the case, or an officer, director or trustee of a party; (2) is a lawyer in the case; (3) is known to have an interest that could be substantially affected by the outcome of the case; or (4) is likely to be a material witness in the case; or

g. Has any other legally sufficient cause to withdraw from participation in the decision making in that case.

**12.16(2)** The term "personally investigated" means taking affirmative steps to interview witnesses directly or to obtain documents or other information directly. The term "personally investigated" does not include general direction and supervision of assigned investigators, unsolicited receipt of information which is relayed to assigned investigators, review of another person's investigative work product in the course of determining whether there is probable cause to initiate a proceeding, or exposure to factual information while performing other board functions, including fact gathering for purposes other than investigation of the matter which culminates in a contested case. Factual information relevant to the merits of a contested case received by a person who later serves as presiding officer in that case shall be disclosed if required by Iowa Code section 17A.17 as amended by 1998 Iowa Acts, chapter 1202, section 19, and subrule 12.31(9).

**12.16(3)** In a situation where a presiding officer or other person knows of information which might reasonably be deemed to be a basis for disqualification and decides voluntary withdrawal is unnecessary, that person shall submit the relevant information for the record by affidavit and shall provide for the record a statement of the reasons for the determination that withdrawal is unnecessary.

**12.16(4)** If a party asserts disqualification on any appropriate ground, including those listed in subrule 12.16(1), the party shall file a motion supported by an affidavit pursuant to Iowa Code section 17A.17 as amended by 1998 Iowa Acts, chapter 1202, section 19(7). The motion must be filed as soon as practicable after the reason alleged in the motion becomes known to the party.

If, during the course of the hearing, a party first becomes aware of evidence of bias or other grounds for disqualification, the party may move for disqualification but must establish the grounds by the introduction of evidence into the record.

If the presiding officer determines that disqualification is appropriate, the presiding officer or other person shall withdraw. If the presiding officer determines that withdrawal is not required, the presiding officer shall enter an order to that effect. A party asserting disqualification may seek an interlocutory appeal under rule 12.33(17A) and seek a stay under rule 12.36(17A).

**193A—12.17(17A) Consolidation—severance.**

**12.17(1)** Consolidation. The presiding officer may consolidate any or all matters at issue in two or more contested case proceedings where (a) the matters at issue involve common parties or common questions of fact or law; (b) consolidation would expedite and simplify consideration of the issues involved; and (c) consolidation would not adversely affect the rights of any of the parties to those proceedings.

**12.17(2)** Severance. The presiding officer may, for good cause shown, order any contested case proceedings or portions thereof severed.

**193A—12.18(17A) Amendments.** Any notice of hearing or statement of charges may be amended before a responsive pleading has been filed. Amendments to pleadings after a responsive pleading has been filed and to an answer may be allowed with the consent of the other parties or in the discretion of the presiding officer who may impose terms or grant a continuance.

**193A—12.19(17A) Service and filing of pleadings and other papers.**

**12.19(1)** When service required. Except where otherwise provided by law, every pleading, motion, document, or other paper filed in a contested case proceeding and every paper relating to discovery in such a proceeding shall be served upon each of the parties of record to the proceeding, including the person designated as advocate or prosecutor for the state or the board, simultaneously with their filing. Except for the original notice of hearing and an application for rehearing as provided in Iowa Code section 17A.16(2), the party filing a document is responsible for service on all parties.

**12.19(2)** Service—how made. Service upon a party represented by an attorney shall be made upon the attorney unless otherwise ordered. Service is made by delivery or by mailing a copy to the person's last-known address. Service by mail is complete upon mailing, except where otherwise specifically provided by statute, rule, or order.

**12.19(3)** Filing—when required. After the notice of hearing, all pleadings, motions, documents or other papers in a contested case proceeding shall be filed with the board. All pleadings, motions, documents or other papers that are required to be served upon a party shall be filed simultaneously with the board.

**12.19(4)** Filing—when made. Except where otherwise provided by law, a document is deemed filed at the time it is delivered to the board, delivered to an established courier service for immediate delivery to that office, or mailed by first-class mail or state interoffice mail to that office, so long as there is proof of mailing.

**12.19(5)** Proof of mailing. Proof of mailing includes either a legible United States Postal Service postmark on the envelope, a certificate of service, a notarized affidavit, or a certification in substantially the following form:

I certify under penalty of perjury and pursuant to the laws of Iowa that, on (date of mailing), I mailed copies of (describe document) addressed to the Accountancy Examining Board and to the names and addresses of the parties listed below by depositing the same in (a United States post office mailbox with correct postage properly affixed or state interoffice mail).

(Date) (Signature)

**193A—12.20(17A) Discovery.**

**12.20(1)** Discovery procedures applicable in civil actions are applicable in contested cases. Unless lengthened or shortened by these rules or by order of the presiding officer, time periods for compliance with discovery shall be as provided in the Iowa Rules of Civil Procedure.

**12.20(2)** Any motion relating to discovery shall allege that the moving party has previously made a good-faith attempt to resolve the discovery issues involved with the opposing party. Motions in regard to discovery shall be ruled upon by the presiding officer. Opposing parties shall be afforded the opportunity to respond within ten days of the fil-

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ing of the motion unless the time is shortened as provided in subrule 12.20(1). The presiding officer may rule on the basis of the written motion and any response, or may order argument on the motion.

**12.20(3)** Evidence obtained in discovery may be used in the contested case proceeding if that evidence would otherwise be admissible in that proceeding.

**193A—12.21(17A) Subpoenas.** In connection with the investigation of a complaint, the board is authorized by law to subpoena books, papers, records, and any other real evidence, whether or not privileged or confidential under law, to help it determine whether it should institute a contested case proceeding (disciplinary hearing). After service of the notice of hearing under rule 12.10(272C,542C), the following procedures are available to the parties in order to obtain relevant and material evidence:

1. Board subpoenas for books, papers, records, and other real evidence will be issued to party upon request. Subpoenas for witnesses may also be obtained. The executive secretary shall issue all subpoenas for both parties upon request. The request, which may be verbal or written, must specify the documents sought to be obtained and the names of the witnesses whose testimony is sought.

2. The presiding officer may quash or modify a subpoena for any lawful reason upon motion in accordance with the Iowa Rules of Civil Procedure. A motion to quash or modify a subpoena shall be set for argument promptly.

3. In the event of a refusal to obey a subpoena, either party or the board may petition the district court for its enforcement. Upon proper showing, the district court shall order the person to obey the subpoena and, if the person fails to obey the order of the court, the person may be found guilty of contempt of court.

**193A—12.22(17A) Motions.**

**12.22(1)** No technical form for motions is required. However, prehearing motions must be in writing, state the grounds for relief, and state the relief sought.

**12.22(2)** Any party may file a written response to a motion within ten days after the motion is served, unless the time period is extended or shortened by rules of the board or the presiding officer. The presiding officer may consider a failure to respond within the required time period in ruling on a motion.

**12.22(3)** The presiding officer may schedule oral argument on any motion.

**12.22(4)** Motions pertaining to the hearing, except motions for summary judgment, must be filed and served at least five days prior to the date of hearing unless there is good cause for permitting later action or the time for such action is lengthened or shortened by rule of the board or an order of the presiding officer.

**12.22(5)** Motions for summary judgment shall comply with the requirements of Iowa Rule of Civil Procedure 237 and shall be subject to disposition according to the requirements of that rule to the extent such requirements are not inconsistent with the provisions of this rule or any other provision of law governing the procedure in contested cases.

Motions for summary judgment must be filed and served at least 20 days prior to the scheduled hearing date, or other time period determined by the presiding officer. Any party resisting the motion shall file and serve a resistance within 10 days, unless otherwise ordered by the presiding officer, from the date a copy of the motion was served. The time fixed for hearing or nonoral submission shall be not less than 15 days after the filing of the motion, unless a shorter time is ordered by the presiding officer. A summary judgment order

rendered on all issues in a contested case is subject to rehearing pursuant to rule 12.35(17A) and appeal pursuant to rule 12.34(272C,542C).

**193A—12.23(17A) Prehearing conference.**

**12.23(1)** Any party may request a prehearing conference. A written request for prehearing conference or an order for prehearing conference on the presiding officer's own motion shall be filed not less than seven days prior to the hearing date. A prehearing conference shall be scheduled not less than three business days prior to the hearing date.

Written notice of the prehearing conference shall be given by the board to all parties. For good cause the presiding officer may permit variances from this rule.

**12.23(2)** Each party shall bring to the prehearing conference:

a. A final list of the witnesses who the party anticipates will testify at hearing. Witnesses not listed may be excluded from testifying unless there was good cause for the failure to include their names; and

b. A final list of exhibits which the party anticipates will be introduced at hearing. Exhibits other than rebuttal exhibits that are not listed may be excluded from admission into evidence unless there was good cause for the failure to include them.

c. Witness or exhibit lists may be amended subsequent to the prehearing conference within the time limits established by the presiding officer at the prehearing conference. Any such amendments must be served on all parties.

**12.23(3)** In addition to the requirements of subrule 12.23(2), the parties at a prehearing conference may:

a. Enter into stipulations of law or fact;

b. Enter into stipulations on the admissibility of exhibits;

c. Identify matters which the parties intend to request be officially noticed;

d. Enter into stipulations for waiver of any provision of law; and

e. Consider any additional matters which will expedite the hearing.

**12.23(4)** Prehearing conferences shall be conducted by telephone unless otherwise ordered. Parties shall exchange and receive witness and exhibit lists in advance of a telephone prehearing conference.

**193A—12.24(17A) Continuances.** Unless otherwise provided, applications for continuances shall be made to the presiding officer.

**12.24(1)** A written application for a continuance shall:

a. Be made at the earliest possible time and no less than seven days before the hearing except in case of unanticipated emergencies;

b. State the specific reasons for the request; and

c. Be signed by the requesting party or the party's representative.

An oral application for a continuance may be made if the presiding officer waives the requirement for a written motion. However, a party making such an oral application for a continuance must confirm that request by written application within five days after the oral request unless that requirement is waived by the presiding officer. No application for continuance shall be made or granted without notice to all parties except in an emergency where notice is not feasible. The board may waive notice of such requests for a particular case or an entire class of cases.

**12.24(2)** In determining whether to grant a continuance, the presiding officer may consider:

a. Prior continuances;

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- b. The interests of all parties;
- c. The likelihood of informal settlement;
- d. The existence of an emergency;
- e. Any objection;
- f. Any applicable time requirements;
- g. The existence of a conflict in the schedules of counsel, parties, or witnesses;
- h. The timeliness of the request; and
- i. Other relevant factors.

The presiding officer may require documentation of any grounds for continuance.

**193A—12.25(17A) Withdrawals.** A party requesting a contested case proceeding may withdraw that request prior to the hearing only in accordance with board rules. Unless otherwise provided, a withdrawal shall be with prejudice.

**193A—12.26(17A) Intervention.**

**12.26(1) Motion.** A motion for leave to intervene in a contested case proceeding shall state the grounds for the proposed intervention, the position and interest of the proposed intervenor, and the possible impact of intervention on the proceeding. A proposed answer or petition in intervention shall be attached to the motion. Any party may file a response within 14 days of service of the motion to intervene unless the time period is extended or shortened by the presiding officer.

**12.26(2) When filed.** Motion for leave to intervene shall be filed as early in the proceeding as possible to avoid adverse impact on existing parties or the conduct of the proceeding. Unless otherwise ordered, a motion for leave to intervene shall be filed before the prehearing conference, if any, or at least 20 days before the date scheduled for hearing. Any later motion must contain a statement of good cause for the failure to file in a timely manner. Unless inequitable or unjust, an intervenor shall be bound by any agreement, arrangement, or other matter previously raised in the case. Requests by untimely intervenors for continuances which would delay the proceeding will ordinarily be denied.

**12.26(3) Grounds for intervention.** The movant shall demonstrate that (a) intervention would not unduly prolong the proceedings or otherwise prejudice the rights of existing parties; (b) the movant is likely to be aggrieved or adversely affected by a final order in the proceeding; and (c) the interests of the movant are not adequately represented by existing parties.

**12.26(4) Effect of intervention.** If appropriate, the presiding officer may order consolidation of the petitions and briefs of different parties whose interests are aligned with each other and limit the number of representatives allowed to participate actively in the proceedings. A person granted leave to intervene is a party to the proceeding. The order granting intervention may restrict the issues that may be raised by the intervenor or otherwise condition the intervenor's participation in the proceeding.

**193A—12.27(272C,542C) Hearings.**

**12.27(1)** A hearing may be conducted before the board or a panel of not less than three members of the board who hold permits to practice public accounting in this state.

**12.27(2)** Panel of nonboard member specialists. When in the opinion of a majority of the board it is desirable to obtain specialists within an area of practice of the public accounting profession when holding disciplinary hearings, the board may appoint a panel of three specialists who are not board members and who hold permits to practice public accounting in this state to make findings of fact and to report to the

board. Such findings shall not include any recommendation for or against licensee discipline.

**12.27(3) Presiding officer.** The board chair or a person designated by the chair shall serve as the presiding officer. The presiding officer shall conduct the hearing and shall have authority to administer oaths, to admit or exclude testimony or other evidence, and to rule on all motions and objections. Either the board or a three-member panel may be assisted by a hearing officer or administrative law judge.

**12.27(4) Immunity.** The presiding officer shall have authority to grant immunity from disciplinary action to a witness, as provided by Iowa Code section 272C.6(3), but only upon the unanimous vote of all members of the hearing panel. The official record of the hearing shall include the reasons for granting the immunity.

**12.27(5) Examination of witnesses by board.** The presiding officer and other board members have the right to question a witness at any stage of that witness's testimony. Examination of witnesses by board members is subject to objections properly raised in accordance with the rules of evidence set forth in subrule 12.27(7).

**12.27(6) Public hearing.** The hearing shall be open to the public unless the licensee or attorney for the licensee requests that the hearing be closed.

**12.27(7) Evidence.** Admissibility of evidence at the hearing shall be governed by Iowa Code section 17A.14.

Copies of documents offered as evidence at the hearing shall be provided to opposing parties. If requested by the board, copies shall also be furnished to each member of the board or hearing panel at the expense of the submitting party.

**12.27(8) Record of proceedings.** Oral proceedings at a hearing shall be recorded by a certified shorthand reporter. The requirement in Iowa Code section 542C.23(7) that a transcript of the proceedings be filed with the board applies only if a transcript is prepared upon the request of either party. Any party to a proceeding may record, at the party's own expense, stenographically or electronically, any portion or all of the proceedings.

**12.27(9) Order of proceedings.** Before testimony is presented, the record shall show the identity of any board members present, identity of the administrative law judge, identity of the primary parties and their representatives, and the fact that all testimony is being recorded. Hearings before the board shall generally be conducted in the following order, subject to modification at the discretion of the board.

a. The presiding officer or designated person may read a summary of the charges and answers thereto and other responsive pleadings filed by the respondent prior to the hearing.

b. The assistant attorney general representing the state's interest before the board shall make a brief opening statement which will include a summary of charges and the witnesses and documents to support such charges.

c. The respondent(s) shall be offered the opportunity to make an opening statement, which includes the names of any witnesses the respondent(s) desires to call in defense. A respondent may elect to make the opening statement just prior to the presentation of evidence by the respondent(s).

d. The presentation of evidence on behalf of the state.

e. A summary, at the close of the evidence on behalf of the state.

f. The presentation of evidence on behalf of the respondent(s).

g. Rebuttal evidence on behalf of the state, if any.

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h. Rebuttal evidence on behalf of the respondent(s), if any.

i. Closing arguments first on behalf of the state, then on behalf of the respondent(s), and then on behalf of the state, if any.

**193A—12.28(272C,542C) Disciplinary sanctions.**

**12.28(1)** The board has authority to impose the following disciplinary sanctions:

a. Revoke a certificate, registration, license, or permit issued by the board. In the event of a revocation, the licensee shall not be allowed to remain a partner or shareholder of a business entity if the law requires all partners or shareholders of such an entity be CPAs or APs.

b. Suspend a certificate, registration, license, or permit issued by the board. A CPA or AP who is under suspension shall refrain, during the period of the suspension, from all facets of the ordinary practice of public accounting.

c. Revoke or suspend the privilege to engage in one or more areas of the practice of public accounting.

d. Impose a period of probation. As a condition to a period of probation, the board may impose terms and conditions deemed appropriate by the board which may include, but are not limited to, the following:

(1) The board may require the licensee to undergo a quality review or peer review. The licensee shall select, subject to approval by the board, a CPA, a firm of CPAs or a review program which is endorsed by the American Institute of Certified Public Accountants. The costs of the review shall be paid by the licensee. The board shall be furnished a copy of the report issued by the reviewing party.

(2) The board may require the licensee to enter into an agreement with a CPA or firm of CPAs to obtain a preissuance review of any audits, compilations, or reviews issued by the licensee during the period of probation. The agreement shall be approved by the board. The board may require the licensee to report regularly concerning the preissuance reviews conducted pursuant to the agreement. Any cost incurred in obtaining preissuance review shall be paid by the licensee.

e. Impose requirements regarding continuing education. The board may specify that a designated amount of continuing education be taken in specific subjects and may specify the time period for completing these courses. The board may also specify whether this continuing education be in addition to that routinely required for license renewal.

The board may also specify that additional continuing education be a condition for the termination of any suspension or reinstatement of a certificate, permit, license, or registration. The board may also specify that current reference materials be obtained and maintained.

f. Required reexamination, using one or more parts of the CPA or AP examinations given to candidates for the CPA certificate or the AP license.

g. Impose civil penalties, the amount of which shall be at the discretion of the board, but which shall not exceed \$1,000. Civil penalties may be imposed for any of the disciplinary violations specified in rule 12.4(272C,542C).

h. Issue a citation and warning.

**12.28(2)** Voluntary surrender. The board may accept the voluntary surrender of a certificate, permit, or license to resolve a contested case. The board shall not accept a voluntary surrender of a certificate, permit, or license to resolve a pending disciplinary case unless a statement of charges has been filed in the case. Such a voluntary surrender will be considered disciplinary action and shall be published in accordance with rule 12.40(272C,542C).

**12.28(3)** Notification requirements. Whenever a licensee's certificate, permit or license is revoked, suspended, or voluntarily surrendered under this chapter, the licensee shall:

a. Within 15 days of receipt of the board's final order, notify in writing all clients of the fact that the license has been revoked, suspended, or voluntarily surrendered. Such notice shall advise the client to obtain alternative professional services;

b. Within 30 days of receipt of the board's final order, file with the board copies of the notices sent pursuant to paragraph 12.28(3)"a." Compliance with this requirement shall be a condition for an application for reinstatement.

**193A—12.29(17A) Evidence.**

**12.29(1)** The presiding officer shall rule on admissibility of evidence and may, where appropriate, take official notice of facts in accordance with all applicable requirements of law.

**12.29(2)** Stipulation of facts is encouraged. The presiding officer may make a decision based on stipulated facts.

**12.29(3)** Evidence in the proceeding shall be confined to the issues as to which the parties received notice prior to the hearing unless the parties waive their right to such notice or the presiding officer determines that good cause justifies expansion of the issues. If the presiding officer decides to admit evidence on issues outside the scope of the notice over the objection of a party who did not have actual notice of those issues, that party, upon timely request, shall receive a continuance sufficient to amend pleadings and to prepare on the additional issue.

**12.29(4)** The party seeking admission of an exhibit must provide opposing parties with an opportunity to examine the exhibit prior to the ruling on its admissibility. Copies of documents shall be provided to opposing parties. Copies may also be furnished to members of the board.

All exhibits admitted into evidence shall be appropriately marked and be made part of the record.

**12.19(5)** Any party may object to specific evidence or may request limits on the scope of any examination or cross-examination. Such an objection shall be accompanied by a brief statement of the grounds upon which it is based. The objection, the ruling on the objection, and the reasons for the ruling shall be noted in the record. The presiding officer may rule on the objection at the time it is made or may reserve a ruling until the written decision.

**12.29(6)** Whenever evidence is ruled inadmissible, the party offering that evidence may submit an offer of proof on the record. The party making the offer of proof for excluded oral testimony shall briefly summarize the testimony or, with permission of the presiding officer, present the testimony. If the excluded evidence consists of a document or exhibit, it shall be marked as part of an offer of proof and inserted in the record.

**193A—12.30(17A) Default.**

**12.30(1)** If a party fails to appear or participate in a contested case proceeding after proper service of notice, the presiding officer may, if no adjournment is granted, enter a default decision or proceed with the hearing and render a decision in the absence of the party.

**12.30(2)** Where appropriate and not contrary to law, any party may move for default against a party who has requested the contested case proceeding and has failed to file a required pleading or has failed to appear after proper service.

**12.30(3)** Default decisions or decisions rendered on the merits after a party has failed to appear or participate in a contested case proceeding become final board action unless,

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within 15 days after the date of notification or mailing of the decision, a motion to vacate is filed and served on all parties or an appeal of a decision on the merits is timely initiated within the time provided by subrule 12.34(3). A motion to vacate must state all facts relied upon by the moving party which establish that good cause existed for that party's failure to appear or participate at the contested case proceeding. Each fact so stated must be substantiated by at least one sworn affidavit of a person with personal knowledge of each such fact, which affidavit(s) must be attached to the motion.

**12.30(4)** The time for further appeal of a decision for which a timely motion to vacate has been filed is stayed pending a decision on the motion to vacate.

**12.30(5)** Properly substantiated and timely filed motions to vacate shall be granted only for good cause shown. The burden of proof as to good cause is on the moving party. Adverse parties shall have ten days to respond to a motion to vacate. Adverse parties shall be allowed to conduct discovery as to the issue of good cause and to present evidence on the issue prior to a decision on the motion, if a request to do so is included in that party's response.

**12.30(6)** "Good cause" for purposes of this rule shall have the same meaning as "good cause" for setting aside a default judgment under Iowa Rule of Civil Procedure 236.

**12.30(7)** A decision denying a motion to vacate is subject to further appeal within the time limit allowed for further appeal of a decision on the merits in the contested case proceeding. A decision granting a motion to vacate is subject to interlocutory appeal by the adverse party pursuant to rule 12.33(17A).

**12.30(8)** If a motion to vacate is granted and no timely interlocutory appeal has been taken, the presiding officer shall issue another notice of hearing and the contested case shall proceed accordingly.

**12.30(9)** A default decision may award any relief consistent with the request for relief made in the petition and embraced in its issues.

**12.30(10)** A default decision may provide either that the default decision is to be stayed pending a timely motion to vacate or that the default decision is to take effect immediately, subject to a request for stay under rule 12.36(17A).

**193A—12.31(17A) Ex parte communication.**

**12.31(1)** Prohibited communications. Unless required for the disposition of ex parte matters specifically authorized by statute, following issuance of the notice of hearing, there shall be no communication, directly or indirectly, between the presiding officer and any party or representative of any party or any other person with a direct or indirect interest in such case in connection with any issue of fact or law in the case except upon notice and opportunity for all parties to participate. This does not prohibit persons jointly assigned such tasks from communicating with each other. Nothing in this provision is intended to preclude the presiding officer from communicating with members of the board or seeking the advice or help of persons other than those with a personal interest in, or those engaged in personally investigating as defined in subrule 12.16(2), prosecuting, or advocating in, either the case under consideration or a pending factually related case involving the same parties as long as those persons do not directly or indirectly communicate to the presiding officer any ex parte communications they have received of a type that the presiding officer would be prohibited from receiving or that furnish, augment, diminish, or modify the evidence in the record.

**12.31(2)** Prohibitions on ex parte communications commence with the issuance of the notice of hearing in a contested case and continue for as long as the case is pending.

**12.31(3)** Written, oral or other forms of communication are ex parte if made without notice and opportunity for all parties to participate.

**12.31(4)** To avoid prohibited ex parte communications, notice must be given in a manner reasonably calculated to give all parties a fair opportunity to participate. Notice of written communications shall be provided in compliance with rule 12.19(17A) and may be supplemented by telephone, facsimile, electronic mail or other means of notification. Where permitted, oral communications may be initiated through conference telephone call including all parties or their representatives.

**12.31(5)** Persons who jointly act as presiding officers in a pending contested case may communicate with each other without notice or opportunity for parties to participate.

**12.31(6)** The executive secretary or other persons may be present in deliberations or otherwise advise the presiding officer without notice or opportunity for parties to participate as long as they are not disqualified from participating in the making of a proposed or final decision under any provision of law and they comply with subrule 12.31(1).

**12.31(7)** Communications with the presiding officer involving uncontested scheduling or procedural matters do not require notice or opportunity for parties to participate. Parties should notify other parties prior to initiating such contact with the presiding officer when feasible, and shall notify other parties when seeking to continue hearings or other deadlines pursuant to rule 12.24(17A).

**12.31(8)** Disclosure of prohibited communications. A presiding officer who receives a prohibited ex parte communication during the pendency of a contested case must initially determine if the effect of the communication is so prejudicial that the presiding officer should be disqualified. If the presiding officer determines that disqualification is warranted, a copy of any prohibited written communication, all written responses to the communication, a written summary stating the substance of any prohibited oral or other communication not available in written form for disclosure, all responses made, and the identity of each person from whom the presiding officer received a prohibited ex parte communication shall be submitted for inclusion in the record under seal by protective order. If the presiding officer determines that disqualification is not warranted, such documents shall be submitted for inclusion in the record and served on all parties. Any party desiring to rebut the prohibited communication must be allowed the opportunity to do so upon written request filed within ten days after notice of the communication.

**12.31(9)** Promptly after being assigned to serve as presiding officer at any stage in a contested case proceeding, a presiding officer shall disclose to all parties material factual information received through ex parte communication prior to such assignment unless the factual information has already been or shortly will be disclosed pursuant to Iowa Code section 17A.13(2) or through discovery. Factual information contained in an investigative report or similar document need not be separately disclosed by the presiding officer as long as such documents have been or will shortly be provided to the parties.

**12.31(10)** The presiding officer may render a proposed or final decision imposing appropriate sanctions for violations of this rule including default, a decision against the offending party, censure, or suspension or revocation of the privi-

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lege to practice before the board. Violation of ex parte communication prohibitions by board personnel shall be reported to the division administrator for possible sanctions including censure, suspension, dismissal, or other disciplinary action.

**193A—12.32(17A) Recording costs.** Upon request, the board shall provide a copy of the whole record or any portion of the record at cost. The cost of preparing a copy of the record or of transcribing the hearing record shall be paid by the requesting party.

Parties who request that a hearing be recorded by certified shorthand reporters rather than by electronic means shall bear the cost of that recordation, unless otherwise provided by law.

**193A—12.33(17A) Interlocutory appeals.** Upon written request of a party or on its own motion, the board may review an interlocutory order of the presiding officer. In determining whether to do so, the board shall weigh the extent to which its granting the interlocutory appeal would expedite final resolution of the case and the extent to which review of that interlocutory order by the board at the time it reviews the proposed decision of the presiding officer would provide an adequate remedy. Any request for interlocutory review must be filed within 14 days of issuance of the challenged order, but no later than the date for compliance with the order or the date of hearing, whichever is earlier.

**193A—12.34(272C,542C) Final decision.**

**12.34(1)** When five or more members of the board preside over the reception of the evidence at the hearing, the decision is a final decision.

**12.34(2)** When a panel of three specialists presides over the hearing, a transcript of the proceedings, together with exhibits presented and the findings of fact of the panel, shall be considered by the board at the earliest practicable time. The parties or the parties' attorneys shall, upon notice prescribed by the board, have the opportunity to appear personally to present their positions and arguments to the board. The decision of the board is a final decision.

**12.34(3)** When a panel of three board members presides over the hearing, the decision is a proposed decision.

a. A proposed decision may be appealed to the board by a party to the decision who is adversely affected. An appeal is commenced by serving on the executive director, either in person or by certified mail, a notice of appeal within 30 days after service of the proposed decision or order on the appealing party. The appealing party shall be the appellant and all other parties to the appeal shall be the appellees.

b. The board may review a proposed decision or order on its motion by serving notice on all parties within 30 days of the issuance of the proposed decision.

c. If the proposed decision is not timely appealed by any party, the proposed decision becomes final.

d. Within seven days after service of the notice of appeal, the appellant shall serve nine copies of its brief in support of the appeal on the executive secretary, and shall furnish an additional copy to each appellee by first-class mail. Any appellee shall have 14 days following service of exceptions and brief to file its brief. Except for the notice of appeal, the time requirements set forth in this rule may be extended by stipulation of the parties or may be extended upon application approved by a member of the board.

e. Oral argument of the appeal is discretionary, but may be required by the board upon its own motion. At the times designated for filing briefs and arguments, either party may request oral argument. If a request for oral argument is

granted, or if required by the board, the executive director shall notify all parties of the date, time, and place. The board chair or designee shall preside at the oral argument.

f. The record on appeal shall be the entire record made before the hearing panel.

**12.34(4)** All parties to a proceeding shall be promptly furnished with a copy of any proposed or final decision either in person or by first-class mail. In addition, either party may request to be notified of the decision by telephone as soon as the decision is reached.

**193A—12.35(17A) Applications for rehearing.**

**12.35(1)** By whom filed. Any party to a contested case proceeding may file an application for rehearing from a final order.

**12.35(2)** Content of application. The application for rehearing shall state on whose behalf it is filed, the specific grounds for rehearing, and the relief sought. In addition, the application shall state whether the applicant desires reconsideration of all or part of the board decision on the existing record and whether, on the basis of the grounds enumerated in subrule 12.34(3), the applicant requests an opportunity to submit additional evidence.

**12.35(3)** Time of filing. The application shall be filed with the board within 20 days after issuance of the final decision.

**12.35(4)** Notice to other parties. A copy of the application shall be timely mailed by the applicant to all parties of record not joining therein. If the application does not contain a certificate of service, the board shall serve copies of the certificate of service on all parties.

**12.35(5)** Disposition. Any application for a rehearing shall be deemed denied unless the board grants the application within 20 days after its filing.

**193A—12.36(17A) Stays of board actions.**

**12.36(1)** When available.

a. Any party to a contested case proceeding may petition the board for a stay of an order issued in that proceeding or for other temporary remedies, pending review by the board. The petition shall be filed with the notice of appeal and shall state the reasons justifying a stay or other temporary remedy. The board may rule on the stay or authorize the presiding officer to do so.

b. Any party to a contested case proceeding may petition the board for a stay or other temporary remedies, pending judicial review of all or part of that proceeding. The petition shall state the reasons justifying a stay or other temporary remedy.

**12.36(2)** When granted. In determining whether to grant a stay, the presiding officer or board shall consider the factors listed in Iowa Code section 17A.19 as amended by 1998 Iowa Acts, chapter 1202, section 23.

**12.36(3)** Vacation. A stay may be vacated by the issuing authority upon application of the board or any other party.

**193A—12.37(17A) No factual dispute contested cases.** If the parties agree that no dispute of material fact exists as to a matter that would be a contested case if such a dispute of fact existed, the parties may present all relevant admissible evidence either by stipulation or otherwise as agreed by the parties, without necessity for the production of evidence at an evidentiary hearing. If such agreement is reached, a jointly submitted schedule detailing the method and timetable for submission of the record, briefs and oral argument should be submitted to the presiding officer for approval as soon as practicable. If the parties cannot agree, any party may file

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and serve a motion for summary judgment pursuant to the rules governing such motions.

**193A—12.38(17A) Emergency adjudicative proceedings.**

**12.38(1)** Necessary emergency action. To the extent necessary to prevent or avoid immediate danger to the public health, safety or welfare, and consistent with the United States Constitution and Iowa Constitution and other provisions of law, the board may issue a written order in compliance with 1998 Iowa Acts, chapter 1202, section 21, to suspend a license in whole or in part, order the cessation of any continuing activity, order affirmative action, or take other action within the jurisdiction of the board by emergency adjudicative order. Before issuing an emergency adjudicative order, the board shall consider factors including, but not limited to, the following:

a. Whether there has been a sufficient factual investigation to assure that the board is proceeding on the basis of reliable information;

b. Whether the specific circumstances which pose immediate danger to the public health, safety or welfare have been identified and determined to be continuing;

c. Whether the person required to comply with the emergency adjudicative order may continue to engage in other activities without posing immediate danger to the public health, safety or welfare;

d. Whether imposition of monitoring requirements or other interim safeguards would be sufficient to protect the public health, safety or welfare; and

e. Whether the specific action contemplated by the board is necessary to avoid the immediate danger.

**12.38(2)** Issuance of order.

a. An emergency adjudicative order shall contain findings of fact, conclusions of law, and policy reasons to justify the determination of an immediate danger in the board's decision to take immediate action.

b. The written emergency adjudicative order shall be immediately delivered to persons who are required to comply with the order by utilizing one or more of the following procedures:

(1) Personal delivery;

(2) Certified mail, return receipt requested, to the last address on file with the board;

(3) Certified mail to the last address on file with the board;

(4) First-class mail to the last address on file with the board; or

(5) Fax. Fax may be used as the sole method of delivery if the person required to comply with the order has filed a written request that board orders be sent by fax and has provided a fax number for that purpose.

c. To the degree practicable, the board shall select the procedure for providing written notice that best ensures prompt, reliable delivery.

**12.38(3)** Oral notice. Unless the written emergency adjudicative order is provided by personal delivery on the same day that the order issues, the board shall make reasonable immediate efforts to contact by telephone the persons who are required to comply with the order.

**12.38(4)** Completion of proceedings. After the issuance of an emergency adjudicative order, the board shall proceed as quickly as feasible to complete any proceedings that would be required if the matter did not involve an immediate danger.

Issuance of a written emergency adjudicative order shall include notification of the date on which board proceedings

are scheduled for completion. After issuance of an emergency adjudicative order, continuance of further board proceedings to a later date will be granted only in compelling circumstances upon application in writing.

**193A—12.39(272C,542C) Judicial review.** Judicial review of the board's decision may be sought in accordance with the terms of Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202.

**193A—12.40(272C,542C) Publicizing disciplinary action.**

**12.40(1)** Final decisions of the board relating to disciplinary actions, including consent agreements and consent orders are public documents, are available to the public and shall be published in the professional licensing division's newsletter. Publication shall include the name of the licensee disciplined by the board, the nature of the violation(s), and the nature of any formal sanction(s) imposed.

**12.40(2)** The board shall issue a formal press release in those instances where a certificate, permit, or license has been suspended or revoked.

**12.40(3)** The board may notify other state boards of accountancy, the National Association of State Boards of Accountancy, any appropriate professional associations, and the news media of disciplinary action taken against an Iowa licensee.

**193A—12.41(272C,542C) Reinstatement.** Any person whose certificate, permit, or license has been revoked or suspended by the board may apply to the board for reinstatement in accordance with the terms of the order of revocation or suspension.

**12.41(1)** If the order of revocation or suspension did not establish terms upon which reinstatement might occur, or if the certification, permit, or license was voluntarily surrendered, an initial application for reinstatement may not be made until one year has elapsed from the date of the order or the date of voluntary surrender.

**12.41(2)** All proceedings for reinstatement shall be initiated by the respondent, who shall file with the board an application for the reinstatement of the certificate, permit, or license. All proceedings upon the petition for reinstatement shall be subject to the same rules of procedure as other cases before the board.

**12.41(3)** An application for reinstatement shall allege facts which, if established, will be sufficient to enable the board to determine that the basis for the revocation or suspension no longer exists and that it will be in the public interest for the license to be reinstated. The burden of proof to establish such facts shall be on the respondent.

**12.41(4)** An application for reinstatement may include a request for a hearing on the issues raised in the application. The hearing on an application for reinstatement shall be a contested case within the meaning of Iowa Code section 17A.12.

**12.41(5)** The order to grant or deny reinstatement shall include findings of fact and conclusions of law, and must be based upon the affirmative vote of not fewer than five members of the board. If reinstatement is granted, terms and conditions of licensure may be imposed. Such terms and conditions may include restrictions on the licensee's practice. This order will be published as provided for in rule 12.40(272C, 542C).

**193A—12.42(272C,542C) Hearing on license denial.** If the board, upon receipt of a complete and proper application for initial registration or reciprocal registration, accompa-

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nied by the proper fee, shall deny registration to the applicant, the executive secretary shall send written notice to the applicant by regular first-class mail identifying the basis for denial.

**12.42(1)** An applicant denied registration who desires to contest the denial must request a hearing before the board within 30 days of the date the notice of denial is mailed. A request for a hearing must be in writing and is deemed made on the date of the United States Postal Service postmark or the date of personal service. The request for hearing shall specify the grounds under which the applicant contends that the board erred in denying registration. If a request for hearing is timely made, the board shall issue notice of hearing and conduct a contested case hearing.

**12.42(2)** Hearings on registration denial shall be open to the public. The burden of presenting evidence and information or documents to support the applicant's position shall be the responsibility of the applicant.

**12.42(3)** The board, after a hearing on registration denial, may grant or deny the application for registration. If denied, the board shall state the reasons for denial of the license and may state conditions under which the application for registration could be granted, if applicable.

**12.42(4)** The notice of registration denial, request for hearing, notice of hearing, and order are open records available for inspection and copying in accordance with Iowa Code chapter 22. Copies may be provided to the media, National Association of State Boards of Accountancy and other persons or entities.

**12.42(5)** Judicial review of a final order denying registration may be sought in accordance with the provisions of Iowa Code section 17A.19 as amended by 1998 Iowa Acts, chapter 1202, which are applicable to judicial review of any agency's final decision in a contested case.

**193A—12.43(272C,542C) Recovery of hearing fees and expenses.** The board may assess the CPA or AP certain fees and expenses relating to a disciplinary hearing only if the board finds that the CPA or AP did violate Iowa Code chapter 542C and the rules of the accountancy examining board.

**12.43(1)** The board may assess an amount up to the following costs under this rule:

a. For conducting a disciplinary hearing, an amount not to exceed \$75.

b. All applicable costs involved in the transcript including, but not limited to, the services of the court reporter at the hearing, transcription, duplication, and postage or delivery costs.

c. All normally accepted witness expenses and fees for a hearing or the taking of depositions. This shall include, but not be limited to, the cost of an expert witness and the cost involved in telephone testimony.

d. All normally applicable costs involved in depositions including, but not limited to, the services of the court reporter recording the deposition, transcription, duplication, and postage or delivery costs.

e. The board, at its discretion, may assess an appropriate amount up to but not exceeding the \$75 fee established by this subrule and the actual acceptable costs, fees, and expenses involved.

**12.43(2)** Fees, costs, and expenses assessed pursuant to this rule shall be calculated and may be entered into the disciplinary order specifying the amount to be reimbursed and the time period in which the amount assessed must be paid by the CPA or AP.

a. When it is impractical or not possible to include the assessment and time period in the disciplinary order in a

timely manner, or if the expenditures occur after the disciplinary order, the board, by a majority vote of the members present, may assess the amount to be reimbursed and the time period in which payment is to be made by the CPA or AP.

b. If the assessment and the time period are not included in the disciplinary order, the board shall have to the end of the sixth month after the date the state of Iowa paid the expenditures to assess the CPA or AP for such expenditure.

**12.43(3)** Fees, costs, and expenses assessed by the board pursuant to this rule shall be allocated to the expenditure category in which the disciplinary procedure of hearing was incurred. The fees, costs, and expenses shall be considered repayment receipts as defined in Iowa Code section 8.2.

**12.43(4)** The failure to comply with payment of the assessed costs, fees, and expenses within the time specified by the board shall be considered prima facie evidence of a violation of Iowa Code chapter 542C. However, no action may be taken against the CPA or AP without a hearing as provided in this chapter.

**193A—12.44(252J) Certificates of noncompliance.** The board shall suspend or revoke a certificate of registration upon the receipt of a certificate of noncompliance from the child support recovery unit of the department of human services according to the procedures in Iowa Code chapter 252J. In addition to the procedures set forth in chapter 252J, this rule shall apply.

**12.44(1)** The notice required by Iowa Code section 252J.8 shall be served upon the registrant by restricted certified mail, return receipt requested, or personal service in accordance with Iowa Rule of Civil Procedure 56.1. Alternatively, the registrant may accept service personally or through authorized counsel.

**12.44(2)** The effective date of revocation or suspension of a certificate of registration, as specified in the notice required by Iowa Code section 252J.8, shall be 60 days following service of the notice upon the registrant.

**12.44(3)** The board's executive secretary is authorized to prepare and serve the notice required by Iowa Code section 252J.8 and is directed to notify the registrant that the certificate of registration will be suspended, unless the registration is already suspended on other grounds. In the event a registration is on suspension, the executive secretary shall notify the registrant of the board's intent to revoke the certificate of registration.

**12.44(4)** Registrants shall keep the board informed of all court actions, and all child support recovery unit actions taken under or in connection with Iowa Code chapter 252J, and shall provide the board copies, within seven days of filing or issuance, of all applications filed with the district court pursuant to Iowa Code section 252J.9, all court orders entered in such actions, and withdrawals of certificates of noncompliance by the child support recovery unit.

**12.44(5)** All board fees required for license renewal or reinstatement must be paid by registrants before a certificate of registration will be renewed or reinstated after the board has suspended or revoked a license pursuant to Iowa Code chapter 252J.

**12.44(6)** In the event a registrant files a timely district court action following service of a board notice pursuant to Iowa Code sections 252J.8 and 252J.9, the board shall continue with the intended action described in the notice upon the receipt of a court order lifting the stay, dismissing the action, or otherwise directing the board to proceed. For purposes of determining the effective date of revocation or suspension of a certificate of registration, the board shall count

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the number of days before the action was filed and the number of days after the action was disposed of by the court.

**12.44(7)** The board shall notify the registrant in writing through regular first-class mail, or such other means as the board deems appropriate in the circumstances, within ten days of the effective date of the suspension or revocation of a certificate of registration, and shall similarly notify the registrant or applicant when the certificate of registration is issued or renewed following the board's receipt of a withdrawal of the certificate of noncompliance.

**193A—12.45(261) Suspension or revocation of a certificate of registration—student loan.** The board shall suspend or revoke a certificate of registration upon receipt of a certificate of noncompliance from the college student aid commission according to the procedures set forth in Iowa Code section 261.126. In addition to those procedures, this rule shall apply.

**12.45(1)** The notice required by Iowa Code section 261.126, shall be served by restricted certified mail, return receipt requested, or by personal service in accordance with the Iowa Rules of Civil Procedure. Alternatively, the registrant may accept service personally or through authorized counsel.

**12.45(2)** The effective date of revocation or suspension of a certificate of registration, as specified in the notice required by Iowa Code section 261.126, shall be 60 days following service of the notice upon the registrant.

**12.45(3)** The board's executive secretary is authorized to prepare and serve the notice required by Iowa Code section 261.126, and is directed to notify the licensee that the certificate of registration will be suspended, unless the certificate of registration is already suspended on other grounds. In the event a certificate of registration is on suspension, the executive secretary shall notify the registrant of the board's intention to revoke the certificate of licensure.

**12.45(4)** Registrants shall keep the board informed of all court actions and all college student aid commission actions taken under or in connection with Iowa Code chapter 261 and shall provide the board copies, within seven days of filing or issuance, of all applications filed with the district court pursuant to Iowa Code section 261.127, all court orders entered in such actions, and withdrawals of certificates of noncompliance by the college student aid commission.

**12.45(5)** All board fees required for registration renewal or registration reinstatement must be paid by registrants and all continuing education requirements must be met before a certificate of registration will be renewed or reinstated after the board has suspended or revoked a license pursuant to Iowa Code chapter 261.

**12.45(6)** In the event a registrant timely files a district court action following service of a board notice pursuant to Iowa Code sections 261.126 and 261.127, the board shall continue with the intended action described in the notice upon the receipt of a court order lifting the stay, dismissing the action, or otherwise directing the board to proceed. For purposes of determining the effective date of the denial of the issuance or renewal of a certificate of registration, the board shall count the number of days before the action was filed and the number of days after the action was disposed of by the court.

**12.45(7)** The board shall notify the registrant in writing through regular first-class mail, or such other means as the board deems appropriate in the circumstances, within ten days of the effective date of the suspension or revocation of a certificate of registration, and shall similarly notify the registrant when the certificate of registration is reinstated follow-

ing the board's receipt of a withdrawal of the certificate of noncompliance.

These rules are intended to implement Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202, and chapters 252J, 272C and 542C and Iowa Code sections 261.126 and 261.127.

**ARC 8818A****AGRICULTURAL DEVELOPMENT  
AUTHORITY[25]****Notice of Intended Action**

Twenty-five interested persons, a governmental subdivision, an agency or association of 25 or more persons may demand an oral presentation hereon as provided in Iowa Code section 17A.4(1)"b."

Notice is also given to the public that the Administrative Rules Review Committee may, on its own motion or on written request by any individual or group, review this proposed action under section 17A.8(6) at a regular or special meeting where the public or interested persons may be heard.

Pursuant to the authority of Iowa Code sections 17A.3 and 175.6, the Agricultural Development Authority (the "Authority") gives Notice of Intended Action to amend Chapter 1, "General," and Chapter 7, "Appeals," and adopt Chapter 9, "Declaratory Orders," and Chapter 10, "Agency Procedure for Rule Making," Iowa Administrative Code.

These proposed amendments update the Authority's address and implement 1998 Iowa Acts, chapter 1202, relating to revisions to the Iowa Administrative Procedure Act. The proposed amendments reflect the change in the authority's address and rescind the Authority's existing rules on agency rule making, declaratory rulings, and the handling of appeals. The proposed amendments adopt by reference the uniform rules regarding declaratory orders, agency procedure for rule making, and contested cases drafted by the Attorney General's office with a few modifications specific to the Authority.

Any interested person may make written suggestions or comments on the following proposed amendments prior to 4:30 p.m. on April 13, 1999. Such written material should be directed to Steven K. Ferguson, Executive Director, Agricultural Development Authority, 505 Fifth Avenue, Suite 327, Des Moines, Iowa 50309-2322. Comments also may be faxed to (515)281-8618 or E-mailed to sfergus@max.state.ia.us.

A public hearing to receive public comments on the proposed amendments will be held at 9:30 a.m. on April 28, 1999, in the conference room of the Authority at the address listed above.

These proposed amendments are intended to implement Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202, and chapter 175.

**ITEM 1.** Amend rule **25—1.4(175)** by deleting the words "Henry A. Wallace State Office Building, Des Moines, Iowa 50319" and inserting "505 Fifth Avenue, Suite 327, Des Moines, Iowa 50309-2322" in lieu thereof.

**ITEM 2.** Rescind rules **25—1.5(175)** through **25—1.8(175)** and renumber rule **25—1.9(175)** as **25—1.5(175)**.

**ITEM 3.** Rescind **25—Chapter 7** and adopt the following new chapter in lieu thereof:

**CHAPTER 7  
CONTESTED CASES**

## AGRICULTURAL DEVELOPMENT AUTHORITY[25](cont'd)

The uniform rules on contested cases published in the February 24, 1999, Iowa Administrative Bulletin are adopted by reference with the following amendments:

**25—7.1(17A,175) Scope and applicability.** In lieu of the words "(agency name)" insert "the agricultural development authority".

**25—7.2(17A,175) Definitions.** Insert the following definitions in alphabetical order:

"Authority" means the agricultural development authority, established pursuant to Iowa Code chapter 175.

"Board" means the board of the authority established in accordance with Iowa Code section 175.3.

In lieu of the words "(designate official)" insert "person designated by the chairperson of the board to preside over a contested case in accordance with the provisions of Iowa Code section 17A.11". In lieu of the words "(agency name)" insert "the authority".

**25—7.3(17A,175) Time requirements.**

7.3(2) Delete the words "or by (specify rule number)".

**25—7.4(17A,175) Requests for contested case proceeding.** In lieu of the first paragraph insert "Any person claiming an entitlement to a contested case proceeding shall file a written request for such a proceeding within the time specified by the particular rules or statutes governing the subject matter or, in the absence of such law, the time specified in the agency action in question. If no time is specified in the agency action and there is no applicable rule or statute, then the written request for a contested case proceeding shall be filed in writing within 30 calendar days of the action or notice of the intended action the person wishes to contest."

**25—7.5(17A,175) Notice of hearing.**

7.5(1) Delete paragraph "e. (other options)."

**25—7.6(17A,175) Presiding officer.**

7.6(1) Delete the words "(or such other time period the agency designates)".

7.6(2) Delete the words "(or its designee)". Delete paragraphs "c" and "i" and reletter the subsequent paragraphs.

7.6(3) Delete the subrule and insert "The agency shall issue a written ruling specifying the grounds for its decision within 20 days after a request for an administrative law judge is filed."

7.6(4) Delete the subrule and renumber the subsequent subrules.

**25—7.12(17A,175) Service and filing of pleadings and other papers.**

7.12(3) In lieu of the words "(specify office and address)" insert "the Agricultural Development Authority, 505 Fifth Avenue, Suite 327, Des Moines, Iowa 50309-2322". In lieu of the words "(agency name)" insert "authority".

7.12(4) In lieu of the words "(designate office)" insert "authority".

**25—7.15(17A,175) Motions.**

7.15(4) Delete the words "(or other time period designated by the agency)".

7.15(5) In lieu of the words "(45 days)" insert "45 days". In lieu of the words "(15 days)" insert "15 days". In lieu of the words "(20 days)" insert "20 days".

**25—7.16(17A,175) Prehearing conference.**

7.16(1) Delete the words "(or other time period designated by the agency)". In lieu of the words "(designate office)" insert "presiding officer".

**25—7.17(17A,175) Continuances.**

7.17(1) Delete the words "(or other time period designated by the agency)".

**25—7.22(17A,175) Default.**

7.22(5) Delete the words "(or other time specified by the agency)".

**25—7.23(17A,175) Ex parte communication.**

7.23(8) In lieu of the words "(or disclosed)" insert "or disclosed".

7.23(10) In lieu of the words "(agency to designate person to whom violations should be reported)" insert "the chairperson of the board or the chairperson's designee".

**25—7.24(17A,175) Recording costs.** In lieu of the words "(agency name)" insert "authority".

**25—7.25(17A,175) Interlocutory appeals.** In lieu of the words "(board, commission, director)" insert "board or the board's designee". In lieu of the words "(of the presiding officer)" insert "of the presiding officer". Delete the words "(or other time period designated by the agency)".

**25—7.26(17A,175) Final decision.**

7.26(1) In lieu of the words "(the agency) (or a quorum of the agency)" insert "the authority".

7.26(2) In lieu of the words "(agency name)" insert "authority".

**25—7.27(17A,175) Appeals and review.**

7.27(1) In lieu of the words "(board, commission, director)" insert "board or the board's designee". Delete the words "(or other time period designated by the agency)".

7.27(2) In lieu of the words "(board, commission, director)" insert "board or the board's designee". Delete the words "(or other time period designated by the agency)".

7.27(3) In lieu of the words "(agency name)" insert "authority".

7.27(4) Delete the words "(or other time period designated by the agency)". In lieu of the words "(board, commission, director)" insert "board or the board's designee".

7.27(5) In lieu of the words "(agency name)" insert "authority".

7.27(6) Delete the words "(or other time period designated by the agency)". In lieu of the words "(board, commission, director)" insert "board or the board's designee".

**25—7.28(17A,175) Applications for rehearing.**

7.28(3) In lieu of the words "(agency name)" insert "authority".

7.28(4) In lieu of the words "(agency name)" insert "authority".

**25—7.29(17A,175) Stays of agency action.**

7.29(1) In lieu of the words "(agency name)" insert "authority". In lieu of the words "(board, commission, director)" insert "board or the board's designee".

7.29(2) In lieu of the words "(board, commission, director, as appropriate)" insert "the board or the board's designee".

7.29(3) In lieu of the words "(agency name)" insert "authority".

ITEM 4. The following new chapter is adopted.

## AGRICULTURAL DEVELOPMENT AUTHORITY[25](cont'd)

CHAPTER 9  
DECLARATORY ORDERS

The uniform rules on declaratory orders published in the February 24, 1999, Iowa Administrative Bulletin are adopted by reference with the following amendments:

**25—9.1(17A,175) Petition for declaratory order.** In lieu of the words “(designate agency)” the first time they appear, insert “agricultural development authority (hereinafter referred to as “the authority”)", and for each time the words “(designate agency)” appear thereafter, insert “authority”. In lieu of the words “(designate office)” insert “505 Fifth Avenue, Suite 327, Des Moines, Iowa 50309-2322”. In lieu of the words “(AGENCY NAME)” insert “AGRICULTURAL DEVELOPMENT AUTHORITY”.

**25—9.2(17A,175) Notice of petition.** In lieu of the words and numbers “\_\_ days (15 or less)” insert “15 days”. In lieu of the words “(designate agency)” insert “authority”.

**25—9.3(17A,175) Intervention.**

**9.3(1)** In lieu of the words “\_\_ days” insert “20 days”.

**9.3(2)** In lieu of the words “(designate agency)” insert “the authority”.

**9.3(3)** In lieu of the words “(designate office)” insert “the authority’s office”. In lieu of the words “(designate agency)” insert “authority”. In lieu of the words “(AGENCY NAME)” insert “AGRICULTURAL DEVELOPMENT AUTHORITY”.

**25—9.4(17A,175) Briefs.** In lieu of the words “(designate agency)” insert “authority”.

**25—9.5(17A,175) Inquiries.** In lieu of the words “(designate official by full title and address)” insert “the Executive Director, Agricultural Development Authority, 505 Fifth Avenue, Suite 327, Des Moines, Iowa 50309-2322”.

**25—9.6(17A,175) Service and filing of petitions and other papers.**

**9.6(2)** In lieu of the words “(specify office and address)” insert “the Executive Director, Agricultural Development Authority, 505 Fifth Avenue, Des Moines, Iowa 50309-2322”. In lieu of the words “(agency name)” insert “authority”.

**9.6(3)** In lieu of the words “(uniform rule on contested cases X.12(17A))” insert “rule 7.12(17A,175)”.

**25—9.7(17A,175) Consideration.** In lieu of the words “(designate agency)” insert “authority”.

**25—9.8(17A,175) Action on petition.**

**9.8(1)** In lieu of the words “(designate agency head)” insert “chairperson of the board”.

**9.8(2)** In lieu of the words “(contested case uniform rule X.2(17A))” insert “contested case uniform rule 7.2(17A,175)”.

**25—9.9(17A,175) Refusal to issue order.**

**9.9(1)** In lieu of the words “(designate agency)” insert “authority”.

**25—9.12(17A,175) Effect of a declaratory order.** In lieu of the words “(designate agency)” insert “authority”. In lieu of the words “(who consent to be bound)” insert “who consent to be bound”.

ITEM 5. The following new chapter is adopted.

CHAPTER 10  
AGENCY PROCEDURE FOR RULE MAKING

The uniform rules on declaratory orders published in the February 24, 1999, Iowa Administrative Bulletin are adopted by reference with the following amendments:

**25—10.1(17A,175) Applicability.** In lieu of the word “agency” insert “the agricultural development authority (hereinafter referred to as “the authority”)".

**25—10.3(17A,175) Public rule-making docket.**

**10.3(2)** In lieu of the words “(commission, board, council, director)” insert “board of the authority”.

**25—10.4(17A,175) Notice of proposed rule making.**

**10.4(3)** In lieu of the words “(specify time period)” insert “one year”.

**25—10.5(17A,175) Public participation.**

**10.5(1)** In lieu of the words “(identify office and address)” insert “the Executive Director, Agricultural Development Authority, 505 Fifth Avenue, Suite 327, Des Moines, Iowa 50309-2322”.

**10.5(5)** In lieu of the words “(designate office and telephone number)” insert “the authority at (515)281-6444”.

**21—10.6(17A,175) Regulatory analysis.**

**10.6(2)** In lieu of the words “(designate office)” insert “the authority”.

**25—10.10(17A,175) Exemptions from public rule-making procedures.**

**10.10(2)** is deleted and the subsequent subrules are re-numbered.

**25—10.11(17A,175) Concise statement of reasons.**

**10.11(1)** In lieu of the words “(specify the office and address)” insert “the Executive Director, Agricultural Development Authority, 505 Fifth Avenue, Suite 327, Des Moines, Iowa 50309-2322”.

**25—10.13(17A,175) Agency rule-making record.**

**10.13(2)** In lieu of the words “(agency head)” insert “executive director”.

ARC 8819A

AGRICULTURE AND LAND  
STEWARDSHIP DEPARTMENT[21]

## Notice of Intended Action

Twenty-five interested persons, a governmental subdivision, an agency or association of 25 or more persons may demand an oral presentation hereon as provided in Iowa Code section 17A.4(1)“b.”

Notice is also given to the public that the Administrative Rules Review Committee may, on its own motion or on written request by any individual or group, review this proposed action under section 17A.8(6) at a regular or special meeting where the public or interested persons may be heard.

Pursuant to the authority of Iowa Code sections 17A.3 and 159.5, the Department of Agriculture and Land Stewardship gives Notice of Intended Action to rescind Chapter 2, “Contested Case Practice and Procedure,” and adopt a new Chapter 2, “Contested Case Proceedings and Practice”; rescind Chapter 4, “Declaratory Rulings,” and adopt a new Chapter 4, “Declaratory Orders”; and rescind Chapter 5, “Agency Procedure for Rule Making,” and adopt a new chapter with the same title in the Iowa Administrative Code.

These proposed amendments implement 1998 Iowa Acts, chapter 1202, relating to revisions to the Iowa Administrative Procedure Act. The proposed amendments rescind the

## AGRICULTURE AND LAND STEWARDSHIP DEPARTMENT[21](cont'd)

existing chapters on agency rule making, declaratory rules, and the handling of contested cases. The proposed amendments adopt by reference the uniform rules drafted by the Attorney General's office with a few modifications specific to the Department.

Any interested person may make written suggestions or comments on the following proposed amendments prior to 4:30 p.m. on April 13, 1999. Such written material should be directed to Ronald R. Rowland, Regulatory Division Director, Department of Agriculture and Land Stewardship, Wallace State Office Building, East Ninth and Grand, Des Moines, Iowa 50319. Comments may also be faxed to (515) 281-4282 or E-mailed to Ron.Rowland@idals.state.ia.us.

A public hearing to receive public comments will be held on Friday, April 16, 1999, at 1 p.m. in the First Floor Conference Room, Wallace State Office Building, East Ninth and Grand, Des Moines, Iowa.

These rules are intended to implement Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202, and chapter 159.

ITEM 1. Rescind 21—Chapter 2 and adopt the following new chapter in lieu thereof:

## CHAPTER 2

## CONTESTED CASE PROCEEDINGS AND PRACTICE

The uniform rules on contested case proceedings published in the February 24, 1999, Iowa Administrative Bulletin are adopted by reference with the following amendments:

**21—2.1(17A,159) Scope and applicability.** In lieu of the words "(agency name)" insert "the department of agriculture and land stewardship".

**21—2.2(17A,159) Definitions.** Insert the following definitions in alphabetical order:

"Department" means the department of agriculture and land stewardship.

"Secretary" means the Iowa secretary of agriculture.

In lieu of the words "(designate official)" insert "person designated by the secretary to preside over a contested case including, but not limited to, an administrative law judge with the department of inspections and appeals. In lieu of the words "(agency name)" insert "the department of agriculture and land stewardship".

**21—2.3(17A,159) Time requirements.**

2.3(2) Delete the words "or by (specify rule number)".

**21—2.4(17A,159) Requests for contested case proceeding.** In lieu of the first paragraph insert "Any person claiming an entitlement to a contested case proceeding shall file a written request for such a proceeding within the time specified by the particular rules or statutes governing the subject matter or, in the absence of such law, the time specified in the agency action in question. If no time is specified in the agency action and there is no applicable rule or statute, then the written request for a contested case proceeding shall be filed in writing within 30 calendar days of the action or notice of the intended action the person wishes to contest."

**21—2.5(17A,159) Notice of hearing.**

2.5(1) Delete paragraph "e. (other options)".

**21—2.6(17A,159) Presiding officer.**

2.6(1) Delete the words "(or such other time period the agency designates)".

2.6(2) Delete the words "(or its designee)": Delete paragraphs "c" and "i" and reletter the subsequent paragraphs.

2.6(3) Delete the subrule and insert "The agency shall issue a written ruling specifying the grounds for its decision within 20 days after a request for an administrative law judge is filed."

2.6(4) Delete the subrule and renumber the subsequent subrules.

**21—2.12(17A,159) Service and filing of pleadings and other papers.**

2.12(3) In lieu of the words "(specify office and address)" insert "Secretary's Office, Department of Agriculture and Land Stewardship, Wallace State Office Building, East Ninth and Grand, Des Moines, Iowa." In lieu of the words "(agency name)" insert "department".

2.12(4) In lieu of the words "(designate office)" insert "secretary's office".

**21—2.15(17A,159) Motions.**

2.15(4) Delete the words "(or other time period designated by the agency)".

2.15(5) In lieu of the words "(45 days)" insert "45 days". In lieu of the words "(15 days)" insert "15 days". In lieu of the words "(20 days)" insert "20 days".

**21—2.16(17A,159) Prehearing conference.**

2.16(1) Delete the words "(or other time period designated by the agency)". In lieu of the words "(designate office)" insert "presiding officer".

**21—2.17(17A,159) Continuances.**

2.17(1) Delete the words "(or other time period designated by the agency)".

**21—2.22(17A,159) Default.**

2.22(5) Delete the words "(or other time specified by the agency)".

**21—2.23(17A,159) Ex parte communication.**

2.23(8) In lieu of the words "(or disclosed)" insert "or disclosed".

2.23(10) In lieu of the words "(agency to designate person to whom violations should be reported)" insert "the secretary or the secretary's designee".

**21—2.24(17A,159) Recording costs.** In lieu of the words "(agency name)" insert "department".

**21—2.25(17A,159) Interlocutory appeals.** In lieu of the words "(board, commission, director)" insert "secretary or the secretary's designee". In lieu of the words "(of the presiding officer)" insert "of the presiding officer". Delete the words "(or other time period designated by the agency)".

**21—2.26(17A,159) Final decision.**

2.26(1) In lieu of the words "(the agency) (or a quorum of the agency)" insert "the department".

2.26(2) In lieu of the words "(agency name)" insert "department".

**21—2.27(17A,159) Appeals and review.**

2.27(1) In lieu of the words "(board, commission, director)" insert "secretary or the secretary's designee". Delete the words "(or other time period designated by the agency)".

2.27(2) In lieu of the words "(board, commission, director)" insert "secretary or the secretary's designee". Delete the words "(or other time period designated by the agency)".

2.27(3) In lieu of the words "(agency name)" insert "department".

2.27(4) Delete the words "(or other time period designated by the agency)". In lieu of the words "(board, commission, director)" insert "secretary or the secretary's designee".

## AGRICULTURE AND LAND STEWARDSHIP DEPARTMENT[21](cont'd)

**2.27(5)** In lieu of the words "(agency name)" insert "department".

**2.27(6)** Delete the words "(or other time period designated by the agency)". In lieu of the words "(board, commission, director)" insert "secretary or the secretary's designee".

**21—2.28(17A,159) Applications for rehearing.**

**2.28(3)** In lieu of the words "(agency name)" insert "department".

**2.28(4)** In lieu of the words "(agency name)" insert "department".

**21—2.29(17A,159) Stays of agency action.**

**2.29(1)** In lieu of the words "(agency name)" insert "department". In lieu of the words "(board, commission, director)" insert "secretary or the secretary's designee".

**2.29(2)** In lieu of the words "(board, commission, director, as appropriate)" insert "secretary or the secretary's designee".

**2.29(3)** In lieu of the words "(agency name)" insert "department".

ITEM 2. Rescind 21—Chapter 4 and adopt the following new chapter in lieu thereof:

**CHAPTER 4  
DECLARATORY ORDERS**

The uniform rules on declaratory orders published in the February 24, 1999, Iowa Administrative Bulletin are adopted by reference with the following amendments:

**21—4.1(17A,159) Petition for declaratory order.** In lieu of the words "(designate agency)" the first time the words are used, insert "department of agriculture and land stewardship (hereinafter referred to as "the department")". In lieu of the words "(designate agency)" the subsequent times the words are used, insert "department". In lieu of the words "(designate office)" insert "Wallace State Office Building, East Ninth and Grand, Des Moines, Iowa 50319." In lieu of the words "(AGENCY NAME)" insert "DEPARTMENT OF AGRICULTURE AND LAND STEWARDSHIP".

**21—4.2(17A,159) Notice of petition.** In lieu of the words "\_\_\_ days (15 or less)" insert "15 days". In lieu of the words "(designate agency)" insert "department".

**21—4.3(17A,159) Intervention.**

**4.3(1)** In lieu of the words "\_\_\_ days" insert "20 days".

**4.3(2)** In lieu of the words "(designate agency)" insert "the department".

**4.3(3)** In lieu of the words "(designate office)" insert "the secretary of agriculture's office". In lieu of the words "(designate agency)" insert "the department". In lieu of the words "(AGENCY NAME)" insert "DEPARTMENT OF AGRICULTURE AND LAND STEWARDSHIP". Delete paragraph "6" and insert in lieu thereof "6. A statement that the intervenor consents to be bound by the determination of the matters presented in the declaratory order proceeding."

**21—4.4(17A,159) Briefs.** In lieu of the words "(designate agency)" insert "department".

**21—4.5(17A,159) Inquiries.** In lieu of the words "(designate official by full title and address)" insert "the Secretary of Agriculture, Department of Agriculture and Land Stewardship, Wallace State Office Building, East Ninth and Grand, Des Moines, Iowa 50319".

**21—4.6(17A,159) Service and filing of petitions and other papers.**

**4.6(2)** In lieu of the words "(specify office and address)" insert "the Secretary of Agriculture, Department of Agriculture and Land Stewardship, Wallace State Office Building, East Ninth and Grand, Des Moines, Iowa 50319". In lieu of the words "(agency name)" insert "department".

**4.6(3)** In lieu of the words "(uniform rule on contested cases X.12(17A))" insert "rule 2.12(17A,159)".

**21—4.7(17A,159) Consideration.** In lieu of the words "(designate agency)" insert "department".

**21—4.8(17A,159) Action on petition.**

**4.8(1)** In lieu of the words "(designate agency head)" insert "the secretary of agriculture".

**4.8(2)** In lieu of the words "(contested case uniform rule X.2(17A))" insert "rule 21—2.2(17A, 159)".

**21—4.9(17A,159) Refusal to issue order.**

**4.9(1)** In lieu of the words "(designate agency)" insert "department".

**21—4.12(17A,159) Effect of a declaratory order.** In lieu of the words "(designate agency)" insert "department". Delete the words "(who consent to be bound)".

ITEM 3. Rescind 21—Chapter 5 and adopt the following new chapter in lieu thereof:

**CHAPTER 5  
AGENCY PROCEDURE FOR RULE MAKING**

The uniform rules on agency procedure for rule making published in the February 24, 1999, Iowa Administrative Bulletin are adopted with the following amendments:

**21—5.1(17A,159) Applicability.** In lieu of the word "agency" insert "the department of agriculture and land stewardship (hereinafter referred to as "the department")".

**21—5.3(17A,159) Public rule-making docket.**

**5.3(2)** In lieu of the words "(commission, board, council, director)" insert "secretary of agriculture".

**21—5.4(17A,159) Notice of proposed rule making.**

**5.4(3)** In lieu of the words "(specify time period)" insert "one year".

**21—5.5(17A,159) Public participation.**

**5.5(1)** In lieu of the words "(identify office and address)" insert "the Secretary of Agriculture, Department of Agriculture and Land Stewardship, Wallace State Office Building, East Ninth and Grand, Des Moines, Iowa 50319".

**5.5(5)** In lieu of the words "(designate office and telephone number)" insert "the secretary of agriculture's office at (515)281-5322".

**21—5.6(17A,159) Regulatory analysis.**

**5.6(2)** In lieu of the words "(designate office)" insert "the secretary of agriculture's office".

**21—5.10(17A,159) Exemptions from public rule-making procedures.**

Subrule 5.10(2) is deleted and subsequent subrules are renumbered.

**21—5.11(17A,159) Concise statement of reasons.**

**5.11(1)** In lieu of the words "(specify the office and address)" insert "the Secretary of Agriculture, Department of

## AGRICULTURE AND LAND STEWARDSHIP DEPARTMENT[21](cont'd)

Agriculture and Land Stewardship, Wallace State Office Building, East Ninth and Grand, Des Moines, Iowa 50319".

**21—5.13(17A,159) Agency rule-making record.**

**5.13(2)** In lieu of the words "(agency head)" insert "secretary of agriculture".

**ARC 8844A****ALCOHOLIC BEVERAGES  
DIVISION[185]****Notice of Intended Action**

*Twenty-five interested persons, a governmental subdivision, an agency or association of 25 or more persons may demand an oral presentation hereon as provided in Iowa Code section 17A.4(1)"b."*

Notice is also given to the public that the Administrative Rules Review Committee may, on its own motion or on written request by any individual or group, review this proposed action under section 17A.8(6) at a regular or special meeting where the public or interested persons may be heard.

Pursuant to the authority of Iowa Code section 123.21, the Alcoholic Beverages Division hereby gives Notice of Intended Action to rescind Chapter 2, "Rule Making," and adopt a new Chapter 2, "Agency Procedure for Rule Making"; rescind Chapter 3, "Declaratory Ruling," and adopt a new Chapter 3, "Declaratory Orders"; amend Chapter 5, "License and Permit Division"; rescind Chapter 9, "Procurement—Leasing of State Liquor Stores"; rescind Chapter 10, "Complaint Procedure," and adopt a new Chapter 10, "Contested Cases"; amend Chapter 12, "Forms"; and rescind Chapter 13, "Operation of State Liquor Stores," Iowa Administrative Code.

Chapters 2, 3 and 10 are rescinded and new Chapters 2, 3, and 10 adopted which implement changes to the Uniform Rules on Agency Procedure required by the Iowa Administrative Procedure Act to comply with 1998 Iowa Acts, chapter 1202.

Chapter 5 is amended by rescinding rules 5.10(123) to 5.19(123). Combination licenses and permits were administratively created to streamline work flow when wine sales were privatized in 1986. With the implementation of a new software program in 1998, all combination licenses and permits were converted to those created by statute.

Chapters 9 and 13 are rescinded and reserved. The chapters are no longer pertinent due to the privatization of state liquor stores.

Subrule 12.1(2) is amended and subrules 12.2(1) to 12.2(6) are rescinded. Subrules 12.2(1) through 12.2(6) are no longer applicable due to the enactment of 1998 Iowa Acts, chapter 1202.

Consideration will be given to all written suggestions or comments on the proposed amendments received on or before April 13, 1999. Comments should be addressed to Judy K. Seib, Alcoholic Beverages Division, 1918 S.E. Hulsizer Road, Ankeny, Iowa 50021-3941, or faxed to (515) 281-7375.

These rules are intended to implement Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202, and Iowa Code chapter 123.

The following amendments are proposed.

ITEM 1. Rescind 185—Chapter 2 and adopt the following **new** Chapter 2 in lieu thereof:

**CHAPTER 2  
AGENCY PROCEDURE FOR RULE MAKING**

**185—2.1(17A) Applicability.** Except to the extent otherwise expressly provided by statute, all rules adopted by the agency are subject to the provisions of Iowa Code chapter 17A, the Iowa administrative procedure Act, and the provisions of this chapter.

**185—2.2(17A) Advice on possible rules before notice of proposed rule adoption.** In addition to seeking information by other methods, the agency may, before publication of a Notice of Intended Action under Iowa Code section 17A.4(1)"a," solicit comments from the public on a subject matter of possible rule making by the agency by causing notice to be published in the Iowa Administrative Bulletin of the subject matter and indicating where, when, and how persons may comment.

**185—2.3(17A) Public rule-making docket.**

**2.3(1) Docket maintained.** The agency shall maintain a current public rule-making docket.

**2.3(2) Anticipated rule making.** The rule-making docket shall list each anticipated rule-making proceeding. A rule-making proceeding is deemed "anticipated" from the time a draft of proposed rules is distributed for internal discussion within the agency. For each anticipated rule-making proceeding the docket shall contain a listing of the precise subject matter which may be submitted for consideration by the administrator for subsequent proposal under the provisions of Iowa Code section 17A.4(1)"a," the name and address of agency personnel with whom persons may communicate with respect to the matter, and an indication of the present status within the agency of that possible rule. The agency may also include in the docket other subjects upon which public comment is desired.

**2.3(3) Pending rule-making proceedings.** The rule-making docket shall list each pending rule-making proceeding. A rule-making proceeding is pending from the time it is commenced, by publication in the Iowa Administrative Bulletin of a Notice of Intended Action pursuant to Iowa Code section 17A.4(1)"a," to the time it is terminated, by publication of a Notice of Termination in the Iowa Administrative Bulletin or the rule becoming effective. For each rule-making proceeding, the docket shall indicate:

- a. The subject matter of the proposed rule;
- b. A citation to all published notices relating to the proceeding;
- c. Where written submissions on the proposed rule may be inspected;
- d. The time during which written submissions may be made;
- e. The names of persons who have made written requests for an opportunity to make oral presentations on the proposed rule, where those requests may be inspected, and where and when oral presentations may be made;
- f. Whether a written request for the issuance of a regulatory analysis, or a concise statement of reasons, has been filed, whether such an analysis or statement or a fiscal impact statement has been issued, and where any such written request, analysis, or statement may be inspected;
- g. The current status of the proposed rule and any agency determinations with respect thereto;
- h. Any known timetable for agency decisions or other action in the proceeding;
- i. The date of the rule's adoption;
- j. The date of the rule's filing, indexing, and publication;
- k. The date on which the rule will become effective; and
- l. Where the rule-making record may be inspected.

## ALCOHOLIC BEVERAGES DIVISION[185](cont'd)

**185—2.4(17A) Notice of proposed rule making.**

**2.4(1)** Contents. At least 35 days before the adoption of a rule the agency shall cause Notice of Intended Action to be published in the Iowa Administrative Bulletin. The Notice of Intended Action shall include:

- a. A brief explanation of the purpose of the proposed rule;
- b. The specific legal authority for the proposed rule;
- c. Except to the extent impracticable, the text of the proposed rule;
- d. Where, when, and how persons may present their views on the proposed rule; and
- e. Where, when, and how persons may demand an oral proceeding on the proposed rule if the notice does not already provide for one.

Where inclusion of the complete text of a proposed rule in the Notice of Intended Action is impracticable, the agency shall include in the notice a statement fully describing the specific subject matter of the omitted portion of the text of the proposed rule, the specific issues to be addressed by that omitted text of the proposed rule, and the range of possible choices being considered by the agency for the resolution of each of those issues.

**2.4(2)** Incorporation by reference. A proposed rule may incorporate other materials by reference only if it complies with all of the requirements applicable to the incorporation by reference of other materials in an adopted rule that are contained in subrule 2.12(2) of this chapter.

**2.4(3)** Copies of notices. Persons desiring to receive copies of future Notices of Intended Action by subscription must file with the agency a written request indicating the name and address to which such notices should be sent. Within seven days after submission of a Notice of Intended Action to the administrative rules coordinator for publication in the Iowa Administrative Bulletin, the agency shall mail or electronically transmit a copy of that notice to subscribers who have filed a written request for either mailing or electronic transmittal with the agency for Notices of Intended Action. The written request shall be accompanied by payment of the subscription price which may cover the full cost of the subscription service, including its administrative overhead and the cost of copying and mailing the Notices of Intended Action for a period of one year.

**185—2.5(17A) Public participation.**

**2.5(1)** Written comments. For at least 20 days after publication of the Notice of Intended Action, persons may submit argument, data, and views, in writing, on the proposed rule. Such written submissions should identify the proposed rule to which they relate and should be submitted to Administrator, Alcoholic Beverages Division, 1918 S.E. Hulsizer Road, Ankeny, Iowa 50021-3941, or the person designated in the Notice of Intended Action.

**2.5(2)** Oral proceedings. The agency may, at any time, schedule an oral proceeding on a proposed rule. The agency shall schedule an oral proceeding on a proposed rule if, within 20 days after the published Notice of Intended Action, a written request for an opportunity to make oral presentations is submitted to the agency by the administrative rules review committee, a governmental subdivision, an agency, an association having not less than 25 members, or at least 25 persons. That request must also contain the following additional information:

1. A request by one or more individual persons must be signed by each of them and include the address and telephone number of each of them.

2. A request by an association must be signed by an officer or designee of the association and must contain a statement that the association has at least 25 members and the address and telephone number of the person signing that request.

3. A request by an agency or governmental subdivision must be signed by an official having authority to act on behalf of the entity and must contain the address and telephone number of the person signing that request.

**2.5(3) Conduct of oral proceedings.**

a. Applicability. This subrule applies only to those oral rule-making proceedings in which an opportunity to make oral presentations is authorized or required by Iowa Code section 17A.4(1)“b” as amended by 1998 Iowa Acts, chapter 1202, section 8, or this chapter.

b. Scheduling and notice. An oral proceeding on a proposed rule may be held in one or more locations and shall not be held earlier than 20 days after notice of its location and time is published in the Iowa Administrative Bulletin. That notice shall also identify the proposed rule by ARC number and citation to the Iowa Administrative Bulletin.

c. Presiding officer. The agency, a member of the agency, or another person designated by the agency who will be familiar with the substance of the proposed rule, shall preside at the oral proceeding on a proposed rule. If the agency does not preside, the presiding officer shall prepare a memorandum for consideration by the agency summarizing the contents of the presentations made at the oral proceeding unless the agency determines that such a memorandum is unnecessary because the agency will personally listen to or read the entire transcript of the oral proceeding.

d. Conduct of proceeding. At an oral proceeding on a proposed rule, persons may make oral statements and make documentary and physical submissions, which may include data, views, comments or arguments concerning the proposed rule. Persons wishing to make oral presentations at such a proceeding are encouraged to notify the agency at least one business day prior to the proceeding and indicate the general subject of their presentations. At the proceeding, those who participate shall indicate their names and addresses, identify any persons or organizations they may represent, and provide any other information relating to their participation deemed appropriate by the presiding officer. Oral proceedings shall be open to the public and shall be recorded by stenographic or electronic means.

(1) Procedure. At the beginning of the oral proceeding, the presiding officer shall give a brief synopsis of the proposed rule, a statement of the statutory authority for the proposed rule, and the reasons for the agency decision to propose the rule. The presiding officer may place time limitations on individual oral presentations when necessary to ensure the orderly and expeditious conduct of the oral proceeding. To encourage joint oral presentations and to avoid repetition, additional time may be provided for persons whose presentations represent the views of other individuals as well as their own views.

(2) Oral presentation. Persons making oral presentations are encouraged to avoid restating matters which have already been submitted in writing.

(3) Discussion. To facilitate the exchange of information, the presiding officer may, where time permits, open the floor to questions or general discussion.

(4) Authority of presiding officer. The presiding officer shall have the authority to take any reasonable action necessary for the orderly conduct of the meeting.

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(5) Submissions. Physical and documentary submissions presented by participants in the oral proceeding shall be submitted to the presiding officer. Such submissions become the property of the agency.

(6) Continuance. The oral proceeding may be continued by the presiding officer to a later time without notice other than by announcement at the hearing.

(7) Questions. Participants in an oral proceeding shall not be required to take an oath or to submit to cross-examination. However, the presiding officer in an oral proceeding may question participants and permit the questioning of participants by other participants about any matter relating to that rule-making proceeding, including any prior written submissions made by those participants in that proceeding; but no participant shall be required to answer any question.

(8) Rebuttal statements. The presiding officer in an oral proceeding may permit rebuttal statements and request the filing of written statements subsequent to the adjournment of the oral presentations.

**2.5(4)** Additional information. In addition to receiving written comments and oral presentations on a proposed rule according to the provisions of this rule, the agency may obtain information concerning a proposed rule through any other lawful means deemed appropriate under the circumstances.

**2.5(5)** Accessibility. The agency shall schedule oral proceedings in rooms accessible to and functional for persons with physical disabilities. Persons who have special requirements should contact the alcoholic beverages division at (515)281-7430 in advance to arrange access or other needed services.

**185—2.6(17A) Regulatory analysis.**

**2.6(1)** Definition of small business. A "small business" is defined in 1998 Iowa Acts, chapter 1202, section 10(7).

**2.6(2)** Mailing list. Small businesses or organizations of small businesses may be registered on the agency's small business impact list by making a written application addressed to Alcoholic Beverages Division, 1918 S.E. Hulsizer Road, Ankeny, Iowa 50021-3941. The application for registration shall state:

- a. The name of the small business or organization of small businesses;
- b. Its address;
- c. The name of a person authorized to transact business for the applicant;
- d. A description of the applicant's business or organization. An organization representing 25 or more persons who qualify as a small business shall indicate that fact.
- e. Whether the registrant desires copies of Notices of Intended Action at cost, or desires advance notice of the subject of all or some specific category of proposed rule making affecting small business.

The agency may at any time request additional information from the applicant to determine whether the applicant is qualified as a small business or as an organization of 25 or more small businesses. The agency may periodically send a letter to each registered small business or organization of small businesses asking whether that business or organization wishes to remain on the registration list. The name of a small business or organization of small businesses will be removed from the list if a negative response is received, or if no response is received within 30 days after the letter is sent.

**2.6(3)** Time of mailing. Within seven days after submission of a Notice of Intended Action to the administrative rules coordinator for publication in the Iowa Administrative

Bulletin, the agency shall mail to all registered small businesses or organizations of small businesses, in accordance with their request, either a copy of the Notice of Intended Action or notice of the subject of that proposed rule making. In the case of a rule that may have an impact on small business adopted in reliance upon Iowa Code section 17A.4(2), the agency shall mail notice of the adopted rule to registered businesses or organizations prior to the time the adopted rule is published in the Iowa Administrative Bulletin.

**2.6(4)** Qualified requesters for regulatory analysis—economic impact. The agency shall issue a regulatory analysis of a proposed rule that conforms to the requirements of 1998 Iowa Acts, chapter 1202, section 10(2a), after a proper request from:

- a. The administrative rules coordinator;
- b. The administrative rules review committee.

**2.6(5)** Qualified requesters for regulatory analysis—business impact. The agency shall issue a regulatory analysis of a proposed rule that conforms to the requirements of 1998 Iowa Acts, chapter 1202, section 10(2b), after a proper request from:

- a. The administrative rules review committee;
- b. The administrative rules coordinator;
- c. At least 25 or more persons who sign the request provided that each represents a different small business;
- d. An organization representing at least 25 small businesses. That organization shall list the name, address and telephone number of not less than 25 small businesses it represents.

**2.6(6)** Time period for analysis. Upon receipt of a timely request for a regulatory analysis the agency shall adhere to the time lines described in 1998 Iowa Acts, chapter 1202, section 10(4).

**2.6(7)** Contents of request. A request for a regulatory analysis is made when it is mailed or delivered to the agency. The request shall be in writing and satisfy the requirements of 1998 Iowa Acts, chapter 1202, section 10(1).

**2.6(8)** Contents of concise summary. The contents of the concise summary shall conform to the requirements of 1998 Iowa Acts, chapter 1202, section 10(4,5).

**2.6(9)** Publication of a concise summary. The agency shall make available, to the maximum extent feasible, copies of the published summary in conformance with 1998 Iowa Acts, chapter 1202, section 10(5).

**2.6(10)** Regulatory analysis contents—rules review committee or rules coordinator. When a regulatory analysis is issued in response to a written request from the administrative rules review committee, or the administrative rules coordinator, the regulatory analysis shall conform to the requirements of 1998 Iowa Acts, chapter 1202, section 10(2a), unless a written request expressly waives one or more of the items listed in the section.

**2.6(11)** Regulatory analysis contents—substantial impact on small business. When a regulatory analysis is issued in response to a written request from the administrative rules review committee, the administrative rules coordinator, at least 25 persons signing that request who each qualify as a small business or by an organization representing at least 25 small businesses, the regulatory analysis shall conform to the requirements of 1998 Iowa Acts, chapter 1202, section 10(2b).

**185—2.7(17A,25B) Fiscal impact statement.**

**2.7(1)** Fiscal impact statement. A proposed rule that mandates additional combined expenditures exceeding \$100,000 by all affected political subdivisions or agencies and entities which contract with political subdivisions to

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provide services must be accompanied by a fiscal impact statement outlining the costs associated with the rule. A fiscal impact statement must satisfy the requirements of Iowa Code section 25B.6.

**2.7(2)** Corrected fiscal impact statement. If the agency determines at the time it adopts a rule that the fiscal impact statement upon which the rule is based contains errors, the agency shall, at the same time, issue a corrected fiscal impact statement and publish the corrected fiscal impact statement in the Iowa Administrative Bulletin.

**185—2.8(17A) Time and manner of rule adoption.**

**2.8(1)** Time of adoption. The agency shall not adopt a rule until the period for making written submissions and oral presentations has expired. Within 180 days after the later of the publication of the Notice of Intended Action, or the end of oral proceedings thereon, the agency shall adopt a rule pursuant to the rule-making proceeding or terminate the proceeding by publication of a notice to that effect in the Iowa Administrative Bulletin.

**2.8(2)** Consideration of public comment. Before the adoption of a rule, the agency shall consider fully all of the written submissions and oral submissions received in that rule-making proceeding or any memorandum summarizing such oral submissions, and any regulatory analysis or fiscal impact statement issued in that rule-making proceeding.

**2.8(3)** Reliance on agency expertise. Except as otherwise provided by law, the agency may use its own experience, technical competence, specialized knowledge, and judgment in the adoption of a rule.

**185—2.9(17A) Variance between adopted rule and published notice of proposed rule adoption.**

**2.9(1)** Rule different from proposed Notice of Intended Action. The agency shall not adopt a rule that differs from the rule proposed in the Notice of Intended Action on which the rule is based unless:

a. The differences are within the scope of the subject matter announced in the Notice of Intended Action and are in character with the issues raised in that notice; and

b. The differences are a logical outgrowth of the contents of that Notice of Intended Action and the comments submitted in response thereto; and

c. Fair warning. The Notice of Intended Action provided fair warning that the outcome of that rule-making proceeding could be the rule in question.

**2.9(2)** Determining fair warning. In determining whether the Notice of Intended Action provided fair warning that the outcome of that rule-making proceeding could be the rule in question, the agency shall consider the following factors:

a. The extent to which persons who will be affected by the rule should have understood that the rule-making proceeding on which it is based could affect their interests;

b. The extent to which the subject matter of the rule or the issues determined by the rule are different from the subject matter or issues contained in the Notice of Intended Action; and

c. The extent to which the effects of the rule differ from the effects of the proposed rule contained in the Notice of Intended Action.

**2.9(3)** Commencement of rule-making proceeding. The agency shall commence a rule-making proceeding within 60 days of its receipt of a petition for rule making seeking the amendment or repeal of a rule that differs from the proposed rule contained in the Notice of Intended Action upon which the rule is based, unless the agency finds that the differences between the adopted rule and the proposed rule are so insub-

stantial as to make such a rule-making proceeding wholly unnecessary. A copy of any such finding and the petition to which it responds shall be sent to petitioner, the administrative rules coordinator, and the administrative rules review committee, within three days of its issuance.

**2.9(4)** Concurrent rule-making proceedings. Nothing in this rule disturbs the discretion of the agency to initiate, concurrently, several different rule-making proceedings on the same subject with several different published Notices of Intended Action.

**185—2.10(17A) Exemptions from public rule-making procedures.**

**2.10(1)** Omission of notice and comment. To the extent the agency for good cause finds that public notice and participation are unnecessary, impracticable, or contrary to the public interest in the process of adopting a particular rule, the agency may adopt that rule without publishing advance Notice of Intended Action in the Iowa Administrative Bulletin and without providing for written or oral public submissions prior to its adoption. The agency shall incorporate the required finding and a brief statement of its supporting reasons in each rule adopted in reliance upon this subrule.

**2.10(2)** Public proceedings on rules adopted without them. The agency may, at any time, commence a standard rule-making proceeding for the adoption of a rule that is identical or similar to a rule it adopts in reliance upon subrule 2.10(1). Upon written petition by a governmental subdivision, the administrative rules review committee, an agency, the administrative rules coordinator, an association having not less than 25 members, or at least 25 persons, the agency shall commence a standard rule-making proceeding for any rule specified in the petition that was adopted in reliance upon subrule 2.10(1). Such a petition must be filed within one year of the publication of the specified rule in the Iowa Administrative Bulletin as an adopted rule. The rule-making proceeding on that rule must be commenced within 60 days of the receipt of such a petition. After a standard rule-making proceeding commenced pursuant to this subrule, the agency may either readopt the rule it adopted without benefit of all usual procedures on the basis of subrule 2.10(1), or may take any other lawful action, including the amendment or repeal of the rule in question, with whatever further proceedings are appropriate.

**185—2.11(17A) Concise statement of reasons.**

**2.11(1)** General. When requested by a person, either prior to the adoption of a rule or within 30 days after its publication in the Iowa Administrative Bulletin as an adopted rule, the agency shall issue a concise statement of reasons for the rule. Requests for such a statement must be in writing and be delivered to the Alcoholic Beverages Division, 1918 S.E. Hulsizer Road, Ankeny, Iowa 50021-3941. The request should indicate whether the statement is sought for all or only a specified part of the rule. Requests will be considered made on the date received.

**2.11(2)** Contents. The concise statement of reasons shall contain:

a. The reasons for adopting the rule;

b. An indication of any change between the text of the proposed rule contained in the published Notice of Intended Action and the text of the rule as finally adopted, with the reasons for any such change;

c. The principal reasons urged in the rule-making proceeding for and against the rule, and the agency's reasons for overruling the arguments made against the rule.

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**2.11(3) Time of issuance.** After a proper request, the agency shall issue a concise statement of reasons by the later of the time the rule is adopted or 35 days after receipt of the request.

**185—2.12(17A) Contents, style, and form of rule.**

**2.12(1) Contents.** Each rule adopted by the agency shall contain the text of the rule and, in addition:

- a. The date the agency adopted the rule;
- b. A brief explanation of the principal reasons for the rule-making action if such reasons are required by 1998 Iowa Acts, chapter 1202, section 8, or the agency in its discretion decides to include such reasons;
- c. A reference to all rules repealed, amended, or suspended by the rule;
- d. A reference to the specific statutory or other authority authorizing adoption of the rule;
- e. Any findings required by any provision of law as a prerequisite to adoption or effectiveness of the rule;
- f. A brief explanation of the principal reasons for the failure to provide for waivers to the rule if no waiver provision is included and a brief explanation of any waiver or special exceptions provided in the rule if such reasons are required by 1998 Iowa Acts, chapter 1202, section 8, or the agency in its discretion decides to include such reasons; and
- g. The effective date of the rule.

**2.12(2) Incorporation by reference.** The agency may incorporate by reference in a proposed or adopted rule, and without causing publication of the incorporated matter in full, all or any part of a code, standard, rule, or other matter if the agency finds that the incorporation of its text in the agency proposed or adopted rule would be unduly cumbersome, expensive, or otherwise inexpedient. The reference in the agency proposed or adopted rule shall fully and precisely identify the incorporated matter by location, title, citation, date, and edition, if any; shall briefly indicate the precise subject and the general contents of the incorporated matter; and shall state that the proposed or adopted rule does not include any later amendments or editions of the incorporated matter. The agency may incorporate such matter by reference in a proposed or adopted rule only if the agency makes copies of it readily available to the public. The rule shall state how and where copies of the incorporated matter may be obtained at cost from this agency, and how and where copies may be obtained from the agency of the United States, this state, another state, or the organization, association, or persons, originally issuing that matter. The agency shall retain permanently a copy of any materials incorporated by reference in a rule of the agency.

If the agency adopts standards by reference to another publication, it shall provide a copy of the publication containing the standards to the administrative rules coordinator for deposit in the state law library and may make the standards available electronically.

**2.12(3) References to materials not published in full.** When the administrative code editor decides to omit the full text of a proposed or adopted rule because publication of the full text would be unduly cumbersome, expensive, or otherwise inexpedient, the agency shall prepare and submit to the administrative code editor for inclusion in the Iowa Administrative Bulletin and Iowa Administrative Code a summary statement describing the specific subject matter of the omitted material. This summary statement shall include the title and a brief description sufficient to inform the public of the specific nature and subject matter of the proposed or adopted rules, and of significant issues involved in these rules. The summary statement shall also describe how a

copy of the full text of the proposed or adopted rule, including any unpublished matter and any matter incorporated by reference, may be obtained from the agency. The agency will provide a copy of that full text at actual cost upon request and shall make copies of the full text available for review at the state law library and may make the standards available electronically.

At the request of the administrative code editor, the agency shall provide a proposed statement explaining why publication of the full text would be unduly cumbersome, expensive, or otherwise inexpedient.

**2.12(4) Style and form.** In preparing its rules, the agency shall follow the uniform numbering system, form, and style prescribed by the administrative rules coordinator.

**185—2.13(17A) Agency rule-making record.**

**2.13(1) Requirement.** The agency shall maintain an official rule-making record for each rule it proposes by publication in the Iowa Administrative Bulletin of a Notice of Intended Action, or adopts. The rule-making record and materials incorporated by reference must be available for public inspection.

**2.13(2) Contents.** The agency rule-making record shall contain:

a. Copies of all publications in the Iowa Administrative Bulletin with respect to the rule or the proceeding upon which the rule is based and any file-stamped copies of agency submissions to the administrative rules coordinator concerning that rule or the proceeding upon which it is based;

b. Copies of any portions of the agency's public rule-making docket containing entries relating to the rule or the proceeding upon which the rule is based;

c. All written petitions, requests, and submissions received by the agency, and all other written materials of a factual nature as distinguished from opinion that are relevant to the merits of the rule and that were created or compiled by the agency and considered by the administrator, in connection with the formulation, proposal, or adoption of the rule or the proceeding upon which the rule is based, except to the extent the agency is authorized by law to keep them confidential; provided, however, that when any such materials are deleted because they are authorized by law to be kept confidential, the agency shall identify in the record the particular materials deleted and state the reasons for that deletion;

d. Any official transcript of oral presentations made in the proceeding upon which the rule is based or, if not transcribed, the stenographic record or electronic recording of those presentations, and any memorandum prepared by a presiding officer summarizing the contents of those presentations;

e. A copy of any regulatory analysis or fiscal impact statement prepared for the proceeding upon which the rule is based;

f. A copy of the rule and any concise statement of reasons prepared for that rule;

g. All petitions for amendment or repeal or suspension of the rule;

h. A copy of any objection to the issuance of that rule without public notice and participation that was filed pursuant to Iowa Code section 17A.4(2) by the administrative rules review committee, the governor, or the attorney general;

i. A copy of any objection to the rule filed by the administrative rules review committee, the governor, or the attorney general pursuant to Iowa Code section 17A.4(4), and any agency response to that objection;

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j. A copy of any significant written criticism of the rule, including a summary of any petitions for waiver of the rule; and

k. A copy of any executive order concerning the rule.

**2.13(3) Effect of record.** Except as otherwise required by a provision of law, the agency rule-making record required by this rule need not constitute the exclusive basis for agency action on that rule.

**2.13(4) Maintenance of record.** The agency shall maintain the rule-making record for a period of not less than five years from the later of the date the rule to which it pertains became effective, the date of the Notice of Intended Action, or the date of any written criticism as described in paragraph 2.13(2) "g," "h," "i," or "j."

**185—2.14(17A) Filing of rules.** The agency shall file each rule it adopts in the office of the administrative rules coordinator. The filing must be executed as soon after adoption of the rule as is practicable. At the time of filing, each rule must have attached to it any fiscal impact statement and any concise statement of reasons that was issued with respect to that rule. If a fiscal impact statement or statement of reasons for that rule was not issued until a time subsequent to the filing of that rule, the note or statement must be attached to the filed rule within five working days after the note or statement is issued. In filing a rule, the agency shall use the standard form prescribed by the administrative rules coordinator.

**185—2.15(17A) Effectiveness of rules prior to publication.**

**2.15(1) Grounds.** The agency may make a rule effective after its filing at any stated time prior to 35 days after its indexing and publication in the Iowa Administrative Bulletin if it finds that a statute so provides, the rule confers a benefit or removes a restriction on some segment of the public, or that the effective date of the rule is necessary to avoid imminent peril to the public health, safety, or welfare. The agency shall incorporate the required finding and a brief statement of its supporting reasons in each rule adopted in reliance upon this subrule.

**2.15(2) Special notice.** When the agency makes a rule effective prior to its indexing and publication in reliance upon the provisions of Iowa Code section 17A.5(2)"b"(3), the agency shall employ all reasonable efforts to make its contents known to the persons who may be affected by that rule prior to the rule's indexing and publication. The term "all reasonable efforts" requires the agency to employ the most effective and prompt means of notice rationally calculated to inform potentially affected parties of the effectiveness of the rule that is justified and practical under the circumstances considering the various alternatives available for this purpose, the comparative costs to the agency of utilizing each of those alternatives, and the harm suffered by affected persons from any lack of notice concerning the contents of the rule prior to its indexing and publication. The means that may be used for providing notice of such rules prior to their indexing and publication include, but are not limited to, any one or more of the following means: radio, newspaper, television, signs, mail, telephone, personal notice or electronic means.

A rule made effective prior to its indexing and publication in reliance upon the provisions of Iowa Code section 17A.5(2)"b"(3) shall include in that rule a statement describing the reasonable efforts that will be used to comply with the requirements of subrule 2.15(2).

**185—2.16(17A) General statements of policy.**

**2.16(1) Compilation, indexing, public inspection.** The agency shall maintain an official, current, and dated com-

pilation that is indexed by subject, containing all of its general statements of policy within the scope of Iowa Code section 17A.2(10)"a," "c," "f," "g," "h," "k." Each addition to, change in, or deletion from the official compilation must also be dated, indexed, and a record thereof kept. Except for those portions containing rules governed by Iowa Code section 17A.2(7)"f," or otherwise authorized by law to be kept confidential, the compilation must be made available for public inspection and copying.

**2.16(2) Enforcement of requirements.** A general statement of policy subject to the requirements of this subsection shall not be relied on by the agency to the detriment of any person who does not have actual, timely knowledge of the contents of the statement until the requirements of subrule 2.16(1) are satisfied. This provision is inapplicable to the extent necessary to avoid imminent peril to the public health, safety, or welfare.

**185—2.17(17A) Review by agency of rules.**

**2.17(1) Written request for review.** Any interested person, association, agency, or political subdivision may submit a written request to the administrative rules coordinator requesting the agency to conduct a formal review of a specified rule. Upon approval of that request by the administrative rules coordinator, the agency shall conduct a formal review of a specified rule to determine whether a new rule should be adopted instead or the rule should be amended or repealed. The agency may refuse to conduct a review if it has conducted such a review of the specified rule within five years prior to the filing of the written request.

**2.17(2) Formal review process.** In conducting the formal review, the agency shall prepare within a reasonable time a written report summarizing its findings, its supporting reasons, and any proposed course of action. The report must include a concise statement of the agency's findings regarding the rule's effectiveness in achieving its objectives, including a summary of any available supporting data. The report shall also concisely describe significant written criticisms of the rule received during the previous five years, including a summary of any petitions for waiver of the rule received by the agency or granted by the agency. The report shall describe alternative solutions to resolve the criticisms of the rule, the reasons any were rejected, and any changes made in the rule in response to the criticisms as well as the reasons for the changes. A copy of the agency's report shall be sent to the administrative rules review committee and the administrative rules coordinator. The report must also be available for public inspection.

These rules are intended to implement Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202.

ITEM 2. Rescind 185—Chapter 3 and adopt the following new Chapter 3 in lieu thereof:

CHAPTER 3  
DECLARATORY ORDERS

**185—3.1(17A) Petition for declaratory order.** Any person may file a petition with the alcoholic beverages division for a declaratory order as to the applicability to specified circumstances of a statute, rule, or order within the primary jurisdiction of the division, at 1918 S.E. Hulsizer Road, Ankeny, Iowa 50021-3941. A petition is deemed filed when it is received by that office. The division shall provide the petitioner with a file-stamped copy of the petition if the petitioner provides the agency an extra copy for this purpose. The petition must be typewritten or legibly handwritten in ink and must substantially conform to the following form:

ALCOHOLIC BEVERAGES DIVISION[185](cont'd)

ALCOHOLIC BEVERAGES DIVISION

Petition by (Name of Petitioner) for a Declaratory Order on (Cite provisions of law involved).



PETITION FOR DECLARATORY ORDER

The petition must provide the following information:

1. A clear and concise statement of all relevant facts on which the order is requested.
2. A citation and the relevant language of the specific statutes, rules, policies, decisions, or orders, whose applicability is questioned, and any other relevant law.
3. The questions petitioner wants answered, stated clearly and concisely.
4. The answers to the questions desired by the petitioner and a summary of the reasons urged by the petitioner in support of those answers.
5. The reasons for requesting the declaratory order and disclosure of the petitioner's interest in the outcome.
6. A statement indicating whether the petitioner is currently a party to another proceeding involving the questions at issue and whether, to the petitioner's knowledge, those questions have been decided by, are pending determination by, or are under investigation by, any governmental entity.
7. The names and addresses of other persons, or a description of any class of persons, known by petitioner to be affected by, or interested in, the questions presented in the petition.
8. Any request by petitioner for a meeting provided for by rule 3.7(17A).

The petition must be dated and signed by the petitioner or the petitioner's representative. It must also include the name, mailing address, and telephone number of the petitioner and petitioner's representative and a statement indicating the person to whom communications concerning the petition should be directed.

**185—3.2(17A) Notice of petition.** Within 15 days after receipt of a petition for a declaratory order, the alcoholic beverages division shall give notice of the petition to all persons not served by the petitioner pursuant to rule 3.6(17A) to whom notice is required by any provision of law. The division may also give notice to any other persons.

**185—3.3(17A) Intervention.**

**3.3(1) Qualified persons.** Persons who qualify under any applicable provision of law as an intervenor and who file a petition for intervention within 15 days of the filing of a petition for declaratory order (after time for notice under rule 3.2(17A) and before 30-day time for agency action under 3.8(17A)) shall be allowed to intervene in a proceeding for a declaratory order.

**3.3(2) Agency discretion.** Any person who files a petition for intervention at any time prior to the issuance of an order may be allowed to intervene in a proceeding for a declaratory order at the discretion of the division.

**3.3(3) Filing of petition.** A petition for intervention shall be filed at 1918 S.E. Hulsizer Road, Ankeny, Iowa 50021-3941. Such a petition is deemed filed when it is received by that office. The division will provide the petitioner with a file-stamped copy of the petition for intervention if the petitioner provides an extra copy for this purpose. A petition for intervention must be typewritten or legibly handwritten in ink and must substantially conform to the following form:

ALCOHOLIC BEVERAGES DIVISION

Petition by (Name of Original Petitioner) for a Declaratory Order on (Cite provisions of law cited in original petition).



PETITION FOR INTERVENTION

The petition for intervention must provide the following information:

1. Facts supporting the intervenor's standing and qualifications for intervention.
2. The answers urged by the intervenor to the question or questions presented and a summary of the reasons urged in support of those answers.
3. Reasons for requesting intervention and disclosure of the intervenor's interest in the outcome.
4. A statement indicating whether the intervenor is currently a party to any proceeding involving the questions at issue and whether, to the intervenor's knowledge, those questions have been decided by, are pending determination by, or are under investigation by, any governmental entity.
5. The names and addresses of any additional persons, or a description of any additional class of persons, known by the intervenor to be affected by, or interested in, the questions presented.
6. Whether the intervenor consents to be bound by the determination of the matters presented in the declaratory order proceeding.

The petition must be dated and signed by the intervenor or the intervenor's representative. It must also include the name, mailing address, and telephone number of the intervenor and intervenor's representative, and a statement indicating the person to whom communications should be directed.

**185—3.4(17A) Briefs.** The petitioner or any intervenor may file a brief in support of the position urged. The division may request a brief from the petitioner, any intervenor, or any other person concerning the questions raised.

**185—3.5(17A) Inquiries.** Inquiries concerning the status of a declaratory order proceeding may be made to the Administrator, Alcoholic Beverages Division, 1918 S.E. Hulsizer Road, Ankeny, Iowa 50021-3941.

**185—3.6(17A) Service and filing of petitions and other papers.**

**3.6(1) When service required.** Except where otherwise provided by law, every petition for declaratory order, petition for intervention, brief, or other paper filed in a proceeding for a declaratory order shall be served upon each of the parties of record to the proceeding, and on all other persons identified in the petition for declaratory order or petition for intervention as affected by or interested in the questions presented, simultaneously with their filing. The party filing a document is responsible for service on all parties and other affected or interested persons.

**3.6(2) Filing—when required.** All petitions for declaratory orders, petitions for intervention, briefs, or other papers in a proceeding for a declaratory order shall be filed with the Alcoholic Beverages Division, 1918 S.E. Hulsizer Road, Ankeny, Iowa 50021-3941. All petitions, briefs, or other papers that are required to be served upon a party shall be filed simultaneously with the division.

**3.6(3) Method of service, time of filing, and proof of mailing.** Method of service, time of filing, and proof of mailing.

## ALCOHOLIC BEVERAGES DIVISION[185](cont'd)

ing shall be as provided by contested case rule 185—10.13(17A).

**185—3.7(17A) Consideration.** Upon request by petitioner, the alcoholic beverages division must schedule a brief and informal meeting between the original petitioner, all intervenors, and the division, a member of the division, or a member of the staff of the division, to discuss the questions raised. The division may solicit comments from any person on the questions raised. Also, comments on the questions raised may be submitted to the division by any person.

**185—3.8(17A) Action on petition.**

**3.8(1) Agency action.** Within the time allowed by 1998 Iowa Acts, chapter 1202, section 13(5), after receipt of a petition for a declaratory order, the administrator or designee shall take action on the petition as required by 1998 Iowa Acts, chapter 1202, section 13(5).

**3.8(2) Issuance of order.** The date of issuance of an order or of a refusal to issue an order is as defined in contested case rule 185—10.2(17A).

**185—3.9(17A) Refusal to issue order.**

**3.9(1) Refusal to issue order.** The division shall not issue a declaratory order where prohibited by 1998 Iowa Acts, chapter 1202, section 13(1), and may refuse to issue a declaratory order on some or all questions raised for the following reasons:

1. The petition does not substantially comply with the required form.
2. The petition does not contain facts sufficient to demonstrate that the petitioner will be aggrieved or adversely affected by the failure of the division to issue an order.
3. The division does not have jurisdiction over the questions presented in the petition.
4. The questions presented by the petition are also presented in a current rule making, contested case, or other agency or judicial proceeding, that may definitively resolve them.
5. The questions presented by the petition would more properly be resolved in a different type of proceeding or by another body with jurisdiction over the matter.
6. The facts or questions presented in the petition are unclear, overbroad, insufficient, or otherwise inappropriate as a basis upon which to issue an order.
7. There is no need to issue an order because the questions raised in the petition have been settled due to a change in circumstances.
8. The petition is not based upon facts calculated to aid in the planning of future conduct but is, instead, based solely upon prior conduct in an effort to establish the effect of that conduct or to challenge an agency decision already made.
9. The petition requests a declaratory order that would necessarily determine the legal rights, duties, or responsibilities of other persons who have not joined in the petition, intervened separately, or filed a similar petition and whose position on the questions presented may fairly be presumed to be adverse to that of petitioner.

10. The petitioner requests the division to determine whether a statute is unconstitutional on its face.

**3.9(2) Grounds for refusal.** A refusal to issue a declaratory order must indicate the specific grounds for the refusal and constitutes final agency action on the petition.

**3.9(3) Filing of new petition.** Refusal to issue a declaratory order pursuant to this provision does not preclude the filing of a new petition that seeks to eliminate the grounds for the refusal to issue an order.

**185—3.10(17A) Contents of declaratory order—effective date.** In addition to the order itself, a declaratory order must contain the date of its issuance, the name of petitioner and all intervenors, the specific statutes, rules, policies, decisions, or orders involved, the particular facts upon which it is based, and the reasons for its conclusion.

A declaratory order is effective on the date of issuance.

**185—3.11(17A) Copies of orders.** A copy of all orders issued in response to a petition for a declaratory order shall be mailed promptly to the original petitioner and all intervenors.

**185—3.12(17A) Effect of a declaratory order.** A declaratory order has the same status and binding effect as a final order issued in a contested case proceeding. It is binding on the division, the petitioner, and any intervenors who consent to be bound and is applicable only in circumstances where the relevant facts and the law involved are indistinguishable from those on which the order was based. As to all other persons, a declaratory order serves only as precedent and is not binding on the division. The issuance of a declaratory order constitutes final agency action on the petition.

These rules are intended to implement Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202.

ITEM 3. Amend 185—Chapter 5 by rescinding rules **185—5.10(123)** to **5.19(123)**.

ITEM 4. Rescind and reserve **185—Chapter 9**.

ITEM 5. Rescind 185—Chapter 10 and adopt the following **new** Chapter 10 in lieu thereof:

#### CHAPTER 10 CONTESTED CASES

**185—10.1(17A) Scope and applicability.** This chapter applies to contested case proceedings conducted by the alcoholic beverages division.

**185—10.2(17A) Definitions.** Except where otherwise specifically defined by law:

“Contested case” means a proceeding defined by Iowa Code section 17A.2(5) and includes any matter defined as a no factual dispute contested case under 1998 Iowa Acts, chapter 1202, section 14.

“Issuance” means the date of mailing of a decision or order or date of delivery if service is by other means unless another date is specified in the order.

“Party” means each person or agency named or admitted as a party or properly seeking and entitled as of right to be admitted as a party.

“Presiding officer” means the administrator, the administrator’s designee or an administrative law judge available under 1998 Iowa Acts, chapter 1202, section 3, and Iowa Code section 123.39(1a).

“Proposed decision” means the presiding officer’s recommended findings of fact, conclusions of law, decision, and order in a contested case in which the administrator did not preside.

**185—10.3(17A) Time requirements.**

**10.3(1) Computation.** Time shall be computed as provided in Iowa Code section 4.1(34).

**10.3(2) Time extended or shortened.** For good cause, the presiding officer may extend or shorten the time to take any action, except as precluded by statute. Except for good cause stated in the record, before extending or shortening the time

## ALCOHOLIC BEVERAGES DIVISION[185](cont'd)

to take any action, the presiding officer shall afford all parties an opportunity to be heard or to file written arguments.

**185—10.4(123,17A) Statute of limitations.** Requests for a contested case proceeding alleging a violation of Iowa Code chapter 123 must be filed with the division or the local authority within one year from the date of the alleged violation or the date of conviction for the violation, whichever is later.

**185—10.5(17A) Requests for contested case proceeding.** Any person claiming an entitlement to a contested case proceeding shall file a written request within the time specified by the particular rules or statutes governing the subject matter or, in the absence of such law, the time specified in the agency action in question.

The request for a contested case proceeding should state the name and address of the requester, identify the specific agency action which is disputed, and where the requester is represented by a lawyer, identify the provisions of law or precedent requiring or authorizing the holding of a contested case proceeding in the particular circumstances involved, and include a short and plain statement of the issues of material fact in dispute.

**185—10.6(17A) Notice of hearing.**

**10.6(1) Delivery.** Delivery of the notice of hearing constitutes the commencement of the contested case proceeding. Delivery may be executed by:

- a. Personal service as provided in the Iowa Rules of Civil Procedure; or
- b. Certified mail, return receipt requested; or
- c. First-class mail; or
- d. Publication, as provided in the Iowa Rules of Civil Procedure.

**10.6(2) Contents.** The notice of hearing shall contain the following information:

- a. A statement of the time, place, and nature of the hearing;
- b. A statement of the legal authority and jurisdiction under which the hearing is to be held;
- c. A reference to the particular sections of the statutes and rules involved;
- d. A short and plain statement of the matters asserted. If the agency or other party is unable to state the matters in detail at the time the notice is served, the initial notice may be limited to a statement of the issues involved. Thereafter, upon application, a more definite and detailed statement shall be furnished;
- e. Identification of all parties including the name, address and telephone number of the person who will act as advocate for the agency or the state and of parties' counsel where known;
- f. Reference to the procedural rules governing conduct of the contested case proceeding.

**185—10.7(17A) Presiding officer.**

**10.7(1) Administrative law judge.** The administrator may appoint an administrative law judge as presiding officer in all contested case hearings pursuant to 1998 Iowa Acts, chapter 1202, section 3, and Iowa Code section 123.39(1a).

**10.7(2) Appeal.** Except as provided otherwise by another provision of law, all rulings by an administrative law judge acting as presiding officer are subject to appeal to the agency. A party must seek any available intra-agency appeal in order to exhaust adequate administrative remedies.

**10.7(3) Administrator's review.** Unless otherwise provided by law, the administrator, when reviewing a proposed decision upon intra-agency appeal, shall have the powers of

and shall comply with the provisions of this chapter which apply to presiding officers.

**185—10.8(17A) Waiver of procedures.** Unless otherwise precluded by law, the parties in a contested case proceeding may waive any provision of this chapter. However, the agency in its discretion may refuse to give effect to such a waiver when it deems the waiver to be inconsistent with the public interest.

**185—10.9(17A) Telephone proceedings.** The presiding officer may resolve preliminary procedural motions by telephone conference in which all parties have an opportunity to participate. Other telephone proceedings may be held with the consent of all parties. The presiding officer will determine the location of the parties and witnesses for telephone hearings. The convenience of the witnesses or parties, as well as the nature of the case, will be considered when location is chosen.

**185—10.10(17A) Disqualification.**

**10.10(1) Withdrawal.** A presiding officer or other person shall withdraw from participation in the making of any proposed or final decision in a contested case if that person:

- a. Has a personal bias or prejudice concerning a party or a representative of a party;
- b. Has personally investigated, prosecuted or advocated in connection with that case, the specific controversy underlying that case, another pending factually related contested case, or a pending factually related controversy that may culminate in a contested case involving the same parties;
- c. Is subject to the authority, direction or discretion of any person who has personally investigated, prosecuted or advocated in connection with that contested case, the specific controversy underlying that contested case, or a pending factually related contested case or controversy involving the same parties;
- d. Has acted as counsel to any person who is a private party to that proceeding within the past two years;
- e. Has a personal financial interest in the outcome of the case or any other significant personal interest that could be substantially affected by the outcome of the case;
- f. Has a spouse or relative within the third degree of relationship that: (1) is a party to the case, or an officer, director or trustee of a party; (2) is a lawyer in the case; (3) is known to have an interest that could be substantially affected by the outcome of the case; or (4) is likely to be a material witness in the case; or
- g. Has any other legally sufficient cause to withdraw from participation in the decision making in that case.

**10.10(2) Personally investigated.** The term "personally investigated" means taking affirmative steps to interview witnesses directly or to obtain documents or other information directly. The term "personally investigated" does not include general direction and supervision of assigned investigators, unsolicited receipt of information which is relayed to assigned investigators, review of another person's investigative work product in the course of determining whether there is probable cause to initiate a proceeding, or exposure to factual information while performing other agency functions, including fact gathering for purposes other than investigation of the matter which culminates in a contested case. Factual information relevant to the merits of a contested case received by a person who later serves as presiding officer in that case shall be disclosed if required by Iowa Code section 17A.17 as amended by 1998 Iowa Acts, chapter 1202, section 19, and subrules 10.10(3) and 10.23(9).

## ALCOHOLIC BEVERAGES DIVISION[185](cont'd)

**10.10(3)** Statement of reasons for nonwithdrawal. In a situation where a presiding officer or other person knows of information which might reasonably be deemed to be a basis for disqualification and decides voluntary withdrawal is unnecessary, that person shall submit the relevant information for the record by affidavit and shall provide for the record a statement of the reasons for the determination that withdrawal is unnecessary.

**10.10(4)** Motion asserting disqualification. If a party asserts disqualification on any appropriate ground, including those listed in subrule 10.10(1), the party shall file a motion supported by an affidavit pursuant to 1998 Iowa Acts, chapter 1202, section 19(7). The motion must be filed as soon as practicable after the reason alleged in the motion becomes known to the party.

If, during the course of the hearing, a party first becomes aware of evidence of bias or other grounds for disqualification, the party may move for disqualification but must establish the grounds by the introduction of evidence into the record.

If the presiding officer determines that disqualification is appropriate, the presiding officer or other person shall withdraw. If the presiding officer determines that withdrawal is not required, the presiding officer shall enter an order to that effect. A party asserting disqualification may seek an interlocutory appeal under rule 10.25(17A) and seek a stay under rule 10.29(17A).

**185—10.11(17A) Consolidation—severance.**

**10.11(1)** Consolidation. The presiding officer may consolidate any or all matters at issue in two or more contested case proceedings where: (a) the matters at issue involve common parties or common questions of fact or law; (b) consolidation would expedite and simplify consideration of the issues involved; and (c) consolidation would not adversely affect the rights of any of the parties to those proceedings.

**10.11(2)** Severance. The presiding officer may, for good cause shown, order any contested case proceedings or portions thereof severed.

**185—10.12(17A) Pleadings.**

**10.12(1)** Pleadings. Pleadings may be required by rule, by the notice of hearing, or by order of the presiding officer.

**10.12(2)** Petition. A petition shall state in separately numbered paragraphs the following:

- a. The persons or entities on whose behalf the petition is filed;
- b. The particular provisions of statutes and rules involved;
- c. The relief demanded and the facts and law relied upon for such relief; and
- d. The name, address and telephone number of the petitioner and the petitioner's attorney, if any.

**10.12(3)** Answer. An answer shall be filed within 20 days of service of the petition unless otherwise ordered. A party may move to dismiss or apply for a more definite and detailed statement when appropriate.

An answer shall show on whose behalf it is filed and specifically admit, deny, or otherwise answer all material allegations of the pleading to which it responds. It shall state any facts deemed to show an affirmative defense and contain as many additional defenses as the pleader may claim.

An answer shall state the name, address and telephone number of the person filing the answer, the person or entity on whose behalf it is filed, and the attorney representing that person, if any.

Any allegation in the petition not denied in the answer is considered admitted. The presiding officer may refuse to consider any defense not raised in the answer which could have been raised on the basis of facts known when the answer was filed if any party would be prejudiced.

**10.12(4)** Amendment. Any notice of hearing, petition, or other charging document may be amended before a responsive pleading has been filed. Amendments to pleadings after a responsive pleading has been filed and to an answer may be allowed with the consent of the other parties or in the discretion of the presiding officer who may impose terms or grant a continuance.

**185—10.13(17A) Service and filing of pleadings and other papers.**

**10.13(1)** When service required. Except where otherwise provided by law, every pleading, motion, document, or other paper filed in a contested case proceeding and every paper relating to discovery in such a proceeding shall be served upon each of the parties of record to the proceeding, including the person designated as advocate or prosecutor for the state or the agency, simultaneously with their filing. Except for the original notice of hearing and an application for rehearing as provided in Iowa Code section 17A.16(2), the party filing a document is responsible for service on all parties.

**10.13(2)** Service—how made. Service upon a party represented by an attorney shall be made upon the attorney unless otherwise ordered. Service is made by delivery or by mailing a copy to the person's last-known address. Service by mail is complete upon mailing, except where otherwise specifically provided by statute, rule, or order.

**10.13(3)** Filing—when required. After the notice of hearing, all pleadings, motions, documents or other papers in a contested case proceeding shall be filed with the Alcoholic Beverages Division, 1918 S.E. Hulsizer Road, Ankeny, Iowa 50021-3941. All pleadings, motions, documents or other papers that are required to be served upon a party shall be filed simultaneously with the division.

**10.13(4)** Filing—when made. Except where otherwise provided by law, a document is deemed filed at the time it is delivered to the division, delivered to an established courier service for immediate delivery to that office, or mailed by first-class mail or state interoffice mail to that office, so long as there is proof of mailing.

**10.13(5)** Proof of mailing. Proof of mailing includes either: a legible United States Postal Service postmark on the envelope, a certificate of service, a notarized affidavit, or a certification in substantially the following form:

I certify under penalty of perjury and pursuant to the laws of Iowa that, on (date of mailing), I mailed copies of (describe document) addressed to the Alcoholic Beverages Division, 1918 S.E. Hulsizer Road, Ankeny, Iowa 50021-3941 and to the names and addresses of the parties listed below by depositing the same in (a United States post office mailbox with correct postage properly affixed or state interoffice mail).

(Date) (Signature)

**10.13(6)** Facsimile. In appropriate cases, a facsimile copy may be filed with approval of the division with subsequent mailing of the original.

**185—10.14(17A) Discovery.**

**10.14(1)** Discovery procedures. Discovery procedures applicable in civil actions are applicable in contested cases. Unless lengthened or shortened by these rules or by order of the presiding officer, time periods for compliance with dis-

## ALCOHOLIC BEVERAGES DIVISION[185](cont'd)

covery shall be as provided in the Iowa Rules of Civil Procedure.

**10.14(2) Discovery motions.** Any motion relating to discovery shall allege that the moving party has previously made a good-faith attempt to resolve the discovery issues involved with the opposing party. Motions in regard to discovery shall be ruled upon by the presiding officer. Opposing parties shall be afforded the opportunity to respond within ten days of the filing of the motion unless the time is shortened as provided in subrule 10.13(1). The presiding officer may rule on the basis of the written motion and any response, or may order argument on the motion.

**10.14(3) Evidence.** Evidence obtained in discovery may be used in the contested case proceeding if that evidence would otherwise be admissible in that proceeding.

**185—10.15(17A) Subpoenas.****10.15(1) Issuance.**

a. Agency subpoenas. An agency subpoena shall be issued to a party on request. Such a request must be in writing. In the absence of good cause for permitting later action, a request for a subpoena must be received at least three days before the scheduled hearing. The request shall include the name, address, and telephone number of the requesting party.

b. Service of subpoenas. Except to the extent otherwise provided by law, parties are responsible for service of their own subpoenas and payment of witness fees and mileage expenses.

**10.15(2) Motion to quash or modify.** The presiding officer may quash or modify a subpoena for any lawful reason upon motion in accordance with the Iowa Rules of Civil Procedure. A motion to quash or modify a subpoena shall be set for argument promptly.

**185—10.16(17A) Motions.**

**10.16(1) Rehearing motions.** No technical form for motions is required. However, prehearing motions must be in writing, state the grounds for relief, and state the relief sought.

**10.16(2) Written responses.** Any party may file a written response to a motion within ten days after the motion is served, unless the time period is extended or shortened by rules of the division or the presiding officer. The presiding officer may consider a failure to respond within the required time period in ruling on a motion.

**10.16(3) Oral argument.** The presiding officer may schedule oral argument on any motion.

**10.16(4) Service.** Motions pertaining to the hearing, except motions for summary judgment, must be filed and served at least ten days prior to the date of hearing unless there is good cause for permitting later action or the time for such action is lengthened or shortened by rule of the division or an order of the presiding officer.

**10.16(5) Motions for summary judgment.** Motions for summary judgment shall comply with the requirements of Iowa Rule of Civil Procedure 237 and shall be subject to disposition according to the requirements of that rule to the extent such requirements are not inconsistent with the provisions of this rule or any other provision of law governing the procedure in contested cases.

Motions for summary judgment must be filed and served at least 45 days prior to the scheduled hearing date, or other time period determined by the presiding officer. Any party resisting the motion shall file and serve a resistance within 15 days, unless otherwise ordered by the presiding officer, from the date a copy of the motion was served. The time

fixed for hearing or nonoral submission shall be not less than 20 days after the filing of the motion, unless a shorter time is ordered by the presiding officer. A summary judgment order rendered on all issues in a contested case is subject to rehearing pursuant to rule 10.28(17A) and appeal pursuant to rule 10.27(17A).

**185—10.17(17A) Continuances.** Unless otherwise provided, applications for continuances shall be made to the presiding officer.

**10.17(1) Application for continuance.** A written application for a continuance shall:

a. Be made at the earliest possible time and no less than three days before the hearing except for a good cause showing;

b. State the specific reasons for the request; and

c. Be signed by the requesting party or the party's representative.

An oral application for a continuance may be made if the presiding officer waives the requirement for a written motion. However, a party making such an oral application for a continuance must confirm that request by written application within five days after the oral request unless that requirement is waived by the presiding officer. No application for continuance shall be made or granted without notice to all parties except in an emergency where notice is not feasible. The agency may waive notice of such requests for a particular case or an entire class of cases.

**10.17(2) Issuing of continuance.** In determining whether to grant a continuance, the presiding officer may consider:

a. Prior continuances;

b. The interests of all parties;

c. The likelihood of informal settlement;

d. The existence of an emergency;

e. Any objection;

f. Any applicable time requirements;

g. The existence of a conflict in the schedules of counsel, parties, or witnesses;

h. The timeliness of the request; and

i. Other relevant factors.

The presiding officer may require documentation of any grounds for continuance. Notwithstanding the foregoing, each party shall be entitled to one continuance without the need of a good cause showing.

**185—10.18(17A) Withdrawals.** A party requesting a contested case proceeding may withdraw that request prior to the hearing without prejudice.

**185—10.19(17A) Intervention.**

**10.19(1) Motion.** A motion for leave to intervene in a contested case proceeding shall state the grounds for the proposed intervention, as well as the position and interest of the proposed intervenor. A proposed answer or petition in intervention shall be attached to the motion. Any party may file a response within 14 days of service of the motion to intervene unless the time period is extended or shortened by the presiding officer.

**10.19(2) When filed.** Motion for leave to intervene shall be filed as early in the proceeding as possible to avoid adverse impact on existing parties or the conduct of the proceeding. Unless otherwise ordered, a motion for leave to intervene shall be filed or at least 20 days before the date scheduled for hearing. Any later motion must contain a statement of good cause for the failure to file in a timely manner. Unless inequitable or unjust, an intervenor shall be bound by any agreement, arrangement, or other matter previously raised in the case. Requests by untimely intervenors

## ALCOHOLIC BEVERAGES DIVISION[185](cont'd)

for continuances which would delay the proceeding will ordinarily be denied.

**10.19(3)** Grounds for intervention. The movant shall demonstrate that: (a) intervention would not unduly prolong the proceedings or otherwise prejudice the rights of existing parties; (b) the movant is likely to be aggrieved or adversely affected by a final order in the proceeding; and (c) the interests of the movant are not adequately represented by existing parties.

**10.19(4)** Effect of intervention. If appropriate, the presiding officer may order consolidation of the petitions and briefs of different parties whose interests are aligned with each other and limit the number of representatives allowed to participate actively in the proceedings. A person granted leave to intervene is a party to the proceeding. The order granting intervention may restrict the issues that may be raised by the intervenor or otherwise condition the intervenor's participation in the proceeding.

**185—10.20(17A) Hearing procedures.**

**10.20(1)** Role of presiding officer. The presiding officer presides at the hearing, and may rule on motions, require briefs, issue a proposed decision, and issue such orders and rulings as will ensure the orderly conduct of the proceedings.

**10.20(2)** Objections. All objections shall be timely made and stated on the record.

**10.20(3)** Representative of parties. Parties have the right to participate or to be represented in all hearings related to their case. Partnerships, corporations, or associations may be represented by any member, officer, director, or duly authorized agent. Any party may be represented by an attorney or another person authorized by law.

**10.20(4)** Role of parties. Subject to terms and conditions prescribed by the presiding officer, parties have the right to introduce evidence on issues of material fact, cross-examine witnesses present at the hearing as necessary for a full and true disclosure of the facts, present evidence in rebuttal, and submit briefs and engage in oral argument.

**10.20(5)** Decorum of hearing. The presiding officer shall maintain the decorum of the hearing and may refuse to admit or may expel anyone whose conduct is disorderly.

**10.20(6)** Sequestering of witnesses. Witnesses may be sequestered during the hearing.

**10.20(7)** Conduct of hearing. The presiding officer shall conduct the hearing in the following manner:

a. The presiding officer shall give an opening statement briefly describing the nature of the proceedings;

b. The parties shall be given an opportunity to present opening statements;

c. Parties shall present their cases in the sequence determined by the presiding officer;

d. Each witness shall be sworn or affirmed by the presiding officer or the court reporter, and be subject to examination and cross-examination. The presiding officer may limit questioning in a manner consistent with law;

e. When all parties and witnesses have been heard, parties may be given the opportunity to present final arguments.

**185—10.21(17A) Evidence.**

**10.21(1)** Admissibility. The presiding officer shall rule on admissibility of evidence and may, where appropriate, take official notice of facts in accordance with all applicable requirements of law.

**10.21(2)** Stipulation of facts. Stipulation of facts is encouraged. The presiding officer may make a decision based on stipulated facts.

**10.21(3)** Scope of evidence. Evidence in the proceeding shall be confined to the issues as to which the parties received notice prior to the hearing unless the parties waive their right to such notice or the presiding officer determines that good cause justifies expansion of the issues. If the presiding officer decides to admit evidence on issues outside the scope of the notice over the objection of a party who did not have actual notice of those issues, that party, upon timely request, shall receive a continuance sufficient to amend pleadings and to prepare on the additional issue.

**10.21(4)** Admission and examination. The party seeking admission of an exhibit must provide opposing parties with an opportunity to examine the exhibit prior to the ruling on its admissibility. Copies of documents should normally be provided to opposing parties.

All exhibits admitted into evidence shall be appropriately marked and be made part of the record.

**10.21(5)** Objection. Any party may object to specific evidence or may request limits on the scope of any examination or cross-examination. Such an objection shall be accompanied by a brief statement of the grounds upon which it is based. The objection, the ruling on the objection, and the reasons for the ruling shall be noted in the record. The presiding officer may rule on the objection at the time it is made or may reserve a ruling until the written decision.

**10.21(6)** Offer of service. Whenever evidence is ruled inadmissible, the party offering that evidence may submit an offer of proof on the record. The party making the offer of proof for excluded oral testimony shall briefly summarize the testimony or, with permission of the presiding officer, present the testimony. If the excluded evidence consists of a document or exhibit, it shall be marked as part of an offer of proof and inserted in the record.

**185—10.22(17A) Default.**

**10.22(1)** Default. If a party fails to appear or participate in a contested case proceeding after proper service of notice, the presiding officer may, if no adjournment is granted, enter a default decision or proceed with the hearing and render a decision in the absence of the party.

**10.22(2)** Motion for default. Where appropriate and not contrary to law, any party may move for default against a party who has requested the contested case proceeding and has failed to file a required pleading or has failed to appear after proper service.

**10.22(3)** Motion to vacate. Default decisions or decisions rendered on the merits after a party has failed to appear or participate in a contested case proceeding become final agency action unless, within 15 days after the date of notification or mailing of the decision, a motion to vacate is filed and served on all parties or an appeal of a decision on the merits is timely initiated within the time provided by rule 10.27(17A). A motion to vacate must state all facts relied upon by the moving party which establish that good cause existed for that party's failure to appear or participate at the contested case proceeding. Each fact so stated must be substantiated by at least one sworn affidavit of a person with personal knowledge of each such fact, which affidavit(s) must be attached to the motion.

**10.22(4)** Appeal. The time for further appeal of a decision for which a timely motion to vacate has been filed is stayed pending a decision on the motion to vacate.

**10.22(5)** Good cause showing. Properly substantiated and timely filed motions to vacate shall be granted only for good cause shown. The burden of proof as to good cause is on the moving party. Adverse parties shall have ten days to respond to a motion to vacate. Adverse parties shall be al-

## ALCOHOLIC BEVERAGES DIVISION[185](cont'd)

lowed to conduct discovery as to the issue of good cause and to present evidence on the issue prior to a decision on the motion, if a request to do so is included in that party's response.

**10.22(6) Good cause defined.** "Good cause" for purposes of this rule shall have the same meaning as "good cause" for setting aside a default judgment under Iowa Rule of Civil Procedure 236.

**10.22(7) Interlocutory appeal.** A decision denying a motion to vacate is subject to further appeal within the time limit allowed for further appeal of a decision on the merits in the contested case proceeding. A decision granting a motion to vacate is subject to interlocutory appeal by the adverse party pursuant to rule 10.25(17A).

**10.22(8) Resumption of hearing.** If a motion to vacate is granted and no timely interlocutory appeal has been taken, the presiding officer shall issue another notice of hearing and the contested case shall proceed accordingly.

**10.22(9) Relief.** A default decision may award any relief consistent with the request for relief made in the petition and embraced in its issues.

**10.22(10) Effect of decision.** A default decision may provide either that the default decision is to be stayed pending a timely motion to vacate or that the default decision is to take effect immediately, subject to a request for stay under rule 10.29(17A).

**185—10.23(17A) Ex parte communication.**

**10.23(1) Prohibited communications.** Unless required for the disposition of ex parte matters specifically authorized by statute, following issuance of the notice of hearing, there shall be no communication, directly or indirectly, between the presiding officer and any party or representative of any party or any other person with a direct or indirect interest in such case in connection with any issue of fact or law in the case except upon notice and opportunity for all parties to participate. This does not prohibit persons jointly assigned such tasks from communicating with each other. Nothing in this provision is intended to preclude the presiding officer from communicating with members of the division or seeking the advice or help of persons other than those with a personal interest in, or those engaged in personally investigating as defined in subrule 10.10(2), prosecuting, or advocating in, either the case under consideration or a pending factually related case involving the same parties as long as those persons do not directly or indirectly communicate to the presiding officer any ex parte communications they have received of a type that the presiding officer would be prohibited from receiving or that furnish, augment, diminish, or modify the evidence in the record.

**10.23(2) Length of prohibitions.** Prohibitions on ex parte communications commence with the issuance of the notice of hearing in a contested case and continue for as long as the case is pending.

**10.23(3) Forms of ex parte communication.** Written, oral or other forms of communication are "ex parte" if made without notice and opportunity for all parties to participate.

**10.23(4) Notice.** To avoid prohibited ex parte communications, notice must be given in a manner reasonably calculated to give all parties a fair opportunity to participate. Notice of written communications shall be provided in compliance with rule 10.13(17A) and may be supplemented by telephone, facsimile, electronic mail or other means of notification. Where permitted, oral communications may be initiated through conference telephone call including all parties or their representatives.

**10.23(5) Communication between presiding officers.** Persons who jointly act as presiding officer in a pending con-

tested case may communicate with each other without notice or opportunity for parties to participate.

**10.23(6) Deliberations.** The administrator or other persons may be present in deliberations or otherwise advise the presiding officer without notice or opportunity for parties to participate as long as they are not disqualified from participating in the making of a proposed or final decision under any provision of law and they comply with subrule 10.23(1).

**10.23(7) Scheduling or procedural matters.** Communications with the presiding officer involving uncontested scheduling or procedural matters do not require notice or opportunity for parties to participate. Parties should notify other parties prior to initiating such contact with the presiding officer when feasible, and shall notify other parties when seeking to continue hearings or other deadlines pursuant to rule 10.17(17A).

**10.23(8) Disqualification of presiding officer.** A presiding officer who receives a prohibited ex parte communication during the pendency of a contested case must initially determine if the effect of the communication is so prejudicial that the presiding officer should be disqualified. If the presiding officer determines that disqualification is warranted, a copy of any prohibited written communication, all written responses to the communication, a written summary stating the substance of any prohibited oral or other communication not available in written form for disclosure, all responses made, and the identity of each person from whom the presiding officer received a prohibited ex parte communication shall be submitted for inclusion in the record under seal by protective order. If the presiding officer determines that disqualification is not warranted, such documents shall be submitted for inclusion in the record and served on all parties. Any party desiring to rebut the prohibited communication must be allowed the opportunity to do so upon written request filed within ten days after notice of the communication.

**10.23(9) Disclosure of prohibited communications.** Promptly after being assigned to serve as presiding officer at any stage in a contested case proceeding, a presiding officer shall disclose to all parties material factual information received through ex parte communication prior to such assignment unless the factual information has already been or shortly will be disclosed pursuant to Iowa Code section 17A.13(2) or through discovery. Factual information contained in an investigative report or similar document need not be separately disclosed by the presiding officer as long as such documents have been or will shortly be provided to the parties.

**10.23(10) Sanctions.** The presiding officer may render a proposed or final decision imposing appropriate sanctions for violations of this rule including default, a decision against the offending party, censure, or suspension or revocation of the privilege to practice before the division. Violation of ex parte communication prohibitions by division personnel shall be reported to the administrator or the administrator's designee for possible sanctions including censure, suspension, dismissal, or other disciplinary action.

**185—10.24(17A) Recording costs.** Upon request, the division shall provide a copy of the whole or any portion of the record at cost. The cost of preparing a copy of the record or of transcribing the hearing record shall be paid by the requesting party.

Parties who request that a hearing be recorded by certified shorthand reporters rather than by electronic means shall bear the cost of that recordation, unless otherwise provided by law.

## ALCOHOLIC BEVERAGES DIVISION[185](cont'd)

**185—10.25(17A) Interlocutory appeals.** Upon written request of a party or on the administrator's own motion, the administrator may review an interlocutory order of the presiding officer. In determining whether to do so, the administrator shall weigh the extent to which its granting the interlocutory appeal would expedite final resolution of the case and the extent to which review of that interlocutory order by the agency at the time it reviews the proposed decision of the presiding officer would provide an adequate remedy. Any request for interlocutory review must be filed within 14 days of issuance of the challenged order, but no later than the time for compliance with the order or the date of hearing, whichever is first.

**185—10.26(17A) Final decision.**

**10.26(1) Administrator's final decision.** When the administrator presides over the reception of evidence at the hearing, the administrator's decision is a final decision.

**10.26(2) Proposed decision.** When the administrator does not preside at the reception of evidence, the presiding officer shall make a proposed decision. The proposed decision becomes the final decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the administrator within the time provided in rule 10.27(17A).

**185—10.27(17A) Appeals and review.**

**10.27(1) Appeal by party.** Any adversely affected party may appeal a proposed decision to the administrator within 30 days after issuance of the proposed decision.

**10.27(2) Review.** The administrator may initiate review of a proposed decision on the administrator's own motion at any time within 30 days following the issuance of such a decision.

**10.27(3) Notice of appeal.** An appeal of a proposed decision is initiated by filing a timely notice of appeal with the division. The notice of appeal must be signed by the appealing party or a representative of that party and contain a certificate of service. The notice shall specify:

- a. The parties initiating the appeal;
- b. The proposed decision or order appealed from;
- c. The specific findings or conclusions to which exception is taken and any other exceptions to the decision or order;
- d. The relief sought;
- e. The grounds for relief.

**10.27(4) Requests to present additional evidence.** A party may request the taking of additional evidence only by establishing that the evidence is material, that good cause existed for the failure to present the evidence at the hearing, and that the party has not waived the right to present the evidence. A written request to present additional evidence must be filed with the notice of appeal or, by a nonappealing party, within 14 days of service of the notice of appeal. The administrator may remand a case to the presiding officer for further hearing or the administrator may preside at the taking of additional evidence.

**10.27(5) Scheduling.** The administrator shall issue a schedule for consideration of the appeal.

**10.27(6) Briefs and arguments.** Unless otherwise ordered, within 30 days of the notice of appeal or order for review, each appealing party may file exceptions and briefs. Within 30 days thereafter, any party may file a responsive brief. Briefs shall cite any applicable legal authority and specify relevant portions of the record in that proceeding. Written requests to present oral argument shall be filed with the briefs. The administrator may resolve the appeal on the

briefs or provide an opportunity for oral argument. The administrator may shorten or extend the briefing period as appropriate.

**185—10.28(17A) Applications for rehearing.**

**10.28(1) By whom filed.** Any party to a contested case proceeding may file an application for rehearing from a final order.

**10.28(2) Content of application.** The application for rehearing shall state on whose behalf it is filed, the specific grounds for rehearing, and the relief sought. In addition, the application shall state whether the applicant desires reconsideration of all or part of the agency decision on the existing record and whether, on the basis of the grounds enumerated in subrule 10.27(4), the applicant requests an opportunity to submit additional evidence.

**10.28(3) Time of filing.** The application shall be filed with the division within 20 days after issuance of the final decision.

**10.28(4) Notice to other parties.** A copy of the application shall be timely mailed by the applicant to all parties of record not joining therein. If the application does not contain a certificate of service, the division shall serve copies on all parties.

**10.28(5) Disposition.** Any application for a rehearing shall be deemed denied unless the agency grants the application within 20 days after its filing.

**185—10.29(17A) Stays of agency actions.**

**10.29(1) When available.**

a. **Agency appeal.** Any party to a contested case proceeding may petition the division for a stay of an order issued in that proceeding or for other temporary remedies, pending review by the division. The petition shall be filed with the notice of appeal and shall state the reasons justifying a stay or other temporary remedy. The administrator may rule on the stay or authorize the presiding officer to do so.

b. **Stay or temporary remedy.** Any party to a contested case proceeding may petition the division for a stay or other temporary remedies pending judicial review of all or part of that proceeding. The petition shall state the reasons justifying a stay or other temporary remedy.

**10.29(2) When granted.** In determining whether to grant a stay, the administrator shall consider the factors listed in 1998 Iowa Acts, chapter 1202, section 23(5c).

**10.29(3) Vacation.** A stay may be vacated by the issuing authority upon application of the division or any other party.

**185—10.30(17A) No factual dispute contested cases.** If the parties agree that no dispute of material fact exists as to a matter that would be a contested case if such a dispute of fact existed, the parties may present all relevant admissible evidence either by stipulation or otherwise as agreed by the parties, without necessity of an evidentiary hearing. If such agreement is reached, a jointly submitted schedule detailing the method and timetable for submission of the record, briefs and oral argument should be submitted to the presiding officer for approval as soon as practicable. If the parties cannot agree, any party may file and serve a motion for summary judgment pursuant to the rules governing such motions.

**185—10.31(17A) Emergency adjudicative proceedings.**

**10.31(1) Necessary emergency action.** To the extent necessary to prevent or avoid immediate danger to the public health, safety, or welfare and, consistent with the Constitution and other provisions of law, the agency may issue a written order in compliance with Iowa Code section 17A.18 to suspend a license in whole or in part, order the cessation of

## ALCOHOLIC BEVERAGES DIVISION[185](cont'd)

any continuing activity, order affirmative action, or take other action within the jurisdiction of the agency by emergency adjudicative order. Before issuing an emergency adjudicative order the agency shall consider factors including, but not limited to, the following:

- a. Whether there has been a sufficient factual investigation to ensure that the agency is proceeding on the basis of reliable information;
- b. Whether the specific circumstances which pose immediate danger to the public health, safety or welfare have been identified and determined to be continuing;
- c. Whether the person required to comply with the emergency adjudicative order may continue to engage in other activities without posing immediate danger to the public health, safety or welfare;
- d. Whether imposition of monitoring requirements or other interim safeguards would be sufficient to protect the public health, safety or welfare; and
- e. Whether the specific action contemplated by the division is necessary to avoid the immediate danger.

**10.31(2) Issuance of order.**

a. Contents. An emergency adjudicative order shall contain findings of fact, conclusions of law, and policy reasons to justify the determination of an immediate danger in the division's decision to take immediate action.

b. Service. The written emergency adjudicative order shall be immediately delivered to persons who are required to comply with the order by utilizing one or more of the following procedures:

- (1) Personal delivery;
- (2) Certified mail, return receipt requested, to the last address on file with the agency;
- (3) Certified mail to the last address on file with the agency;
- (4) First-class mail to the last address on file with the agency; or
- (5) Fax. Fax may be used as the sole method of delivery if the person required to comply with the order has filed a written request that agency orders be sent by fax and has provided a fax number for that purpose.

c. Delivery. To the degree practicable, the agency shall select the procedure for providing written notice that best ensures prompt, reliable delivery.

**10.31(3) Oral notice.** Unless the written emergency adjudicative order is provided by personal delivery on the same day that the order issues, the agency shall make reasonable immediate efforts to contact by telephone the persons who are required to comply with the order.

**10.31(4) Completion of proceedings.** After the issuance of an emergency adjudicative order, the agency shall proceed as quickly as feasible to complete any proceedings that would be required if the matter did not involve an immediate danger.

These rules are intended to implement Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202.

**ITEM 6. Amend subrule 12.1(2) as follows:**

**12.1(2) General requirements.** All papers, except exhibits, shall be cut or folded so as not to exceed 8½ inches by 14 1/2 inches in size with inside margins not less than 1 inch in width. Whenever practical, all exhibits of a documentary character should conform to the foregoing requirements of size and margin. ~~Papers should contain the name and address of the party filing the paper and, if represented by an attorney, the name and office address of such attorney. Except as otherwise provided in these rules, the original of all papers and exhibits should be filed with the division. The~~

~~person filing the paper or exhibit shall also furnish additional copies for each respondent or party to be served by the division and such other copies as the division may request.~~

**ITEM 7. Amend 185—Chapter 12 by rescinding subrules 12.2(1) to 12.2(6).**

**ITEM 8. Rescind and reserve 185—Chapter 13.**

**ARC 8822A**

## APPEAL BOARD, STATE[543]

### Notice of Intended Action

Twenty-five interested persons, a governmental subdivision, an agency or association of 25 or more persons may demand an oral presentation hereon as provided in Iowa Code section 17A.4(1)"b."

Notice is also given to the public that the Administrative Rules Review Committee may, on its own motion or on written request by any individual or group, review this proposed action under section 17A.8(6) at a regular or special meeting where the public or interested persons may be heard.

Pursuant to the authority of Iowa Code section 24.30, the State Appeal Board gives Notice of Intended Action to amend Chapter 2, "General Provisions," and Chapter 5, "Budget Appeals," and to adopt a new Chapter 7, "Agency Procedure for Rule Making," Iowa Administrative Code.

The proposed amendments bring the Board's rules on administrative rule making and declaratory orders into conformance with 1998 Iowa Acts, chapter 1202, which amended the Iowa Administrative Procedure Act.

The Board's proposed amendments to its rules are based on the amendments to the Uniform Rules on Agency Procedure drafted by a task force from the Attorney General's Office and published in the first volume of the Iowa Administrative Code and the Iowa Administrative Bulletin on February 24, 1999.

Interested persons may make written comments or suggestions on the proposed amendments on or before April 13, 1999. Written materials should be addressed to the Secretary of the State Appeal Board, State Capitol, Room 12, Des Moines, Iowa 50319-0015, or faxed to (515)242-5897. E-mail may be sent to Ron.Amosson@idom.state.ia.us.

These amendments are intended to implement Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202, and Iowa Code section 25B.6.

The following amendments are proposed.

**ITEM 1. Amend rules 543—2.4(17A) and 543—5.3(17A) as follows:**

**543—2.4(17A) Declaratory rulings orders.** Any interested person(s) may submit to the secretary of the board a petition for a declaratory ~~ruling order~~ regarding the application of a statute, rule, decision, order, or other written statement of law or policy to a specific factual situation. The petition requesting the ~~ruling order~~ shall contain the name(s) of the person(s) requesting the ~~ruling order~~, the specific factual background of the question, the statute, rule, decision, order or other written statement of law or policy deemed applicable and the reasons for the request. The board may demand that the request be clarified or that additional facts be set forth. Failure of the person(s) requesting a declaratory ~~ruling order~~ to clarify the request or set forth additional facts to the satisfaction of the board shall be grounds for dismissal of the petition.

**543—5.3(24) Declaratory rulings orders.**

**5.3(1)** Any interested person(s) may submit to the executive secretary of the board a petition for a declaratory ~~ruling~~

## APPEAL BOARD, STATE[543](cont'd)

*order* regarding the application to a specific factual situation of a statute, rule, decision, order, or other written statement of law or policy. The petition requesting the ~~ruling~~ *order* shall contain the name(s) of the person(s) requesting the ~~ruling~~ *order*, the specific factual background of the question, the statute, rule, decision, order or other written statement of law or policy deemed applicable and the reasons for the request.

5.3(2) The board may demand that the request be clarified or that additional facts be set forth. Failure of the person(s) requesting a declaratory ~~ruling~~ *order* to clarify the request or set forth additional facts to the satisfaction of the board shall be grounds for dismissal of the petition.

ITEM 2. Add a **new** 543—Chapter 7 as follows:

## CHAPTER 7

## AGENCY PROCEDURE FOR RULE MAKING

The state appeal board adopts the agency procedure for rule making segment of the Uniform Rules on Agency Procedure which is printed in the first volume of the Iowa Administrative Code with the following amendments.

**543—7.3(17A) Public rule-making docket.**

7.3(2) Anticipated rule making. In lieu of the words “(commission, board, council, director)”, insert “board”.

**543—7.4(17A) Notice of proposed rule making.**

7.4(3) Copies of notices. In lieu of the words “(specify time period)”, insert “one calendar year”.

**543—7.5(17A) Public participation.**

7.5(1) Written comments. Strike the words “(identify office and address) or”.

7.5(5) Accessibility. In lieu of the words “(designate office and telephone number)”, insert “the secretary of the state appeal board at (515)281-3078”.

**543—7.6(17A) Regulatory analysis.**

7.6(2) Mailing list. In lieu of the words “(designate office)” insert “the State Appeal Board, State Capitol, Des Moines, Iowa 50319-0015”.

**543—7.10(17A) Exemptions from public rule-making procedures.**

7.10(2) Categories exempt. In lieu of the words “(List here narrowly drawn classes of rules where such an exemption is justified and a brief statement of the reasons for exempting each of them)”, insert the following:

“a. Rules which are mandated by federal law or regulation in any situation where the department has no option but to adopt specified rules or where federal funding is contingent upon the adoption of the rules;

“b. Rules which implement recent legislation when a statute provides for an effective date which does not allow for the usual notice and public participation requirements;

“c. Rules which confer a benefit or remove a restriction on the public or some segment of the public;

“d. Rules which are necessary because of imminent peril to the public health, safety or welfare; and

“e. Nonsubstantive rules intended to correct typographical errors, incorrect citations, or other errors in existing rules.”

**543—7.11(17A) Concise statement of reasons.**

7.11(1) General. In lieu of the words “(specify the office and address)”, insert “the State Appeal Board, State Capitol, Des Moines, Iowa 50319-0015”.

**543—7.13(17A) Agency rule-making record.**

7.13(2) Contents. Amend paragraph “c” by inserting “state appeal board” in lieu of “(agency head)”.

These rules are intended to implement Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202, and Iowa Code section 25B.6.

**ARC 8817A****BANKING DIVISION[187]****Notice of Intended Action**

Twenty-five interested persons, a governmental subdivision, an agency or association of 25 or more persons may demand an oral presentation hereon as provided in Iowa Code section 17A.4(1)“b.”

Notice is also given to the public that the Administrative Rules Review Committee may, on its own motion or on written request by any individual or group, review this proposed action under section 17A.8(6) at a regular or special meeting where the public or interested persons may be heard.

Pursuant to the authority of Iowa Code sections 17A.3 and 524.213, the Banking Division of the Commerce Department hereby gives Notice of Intended Action to rescind Chapter 5, “Petitions for Rule Making,” and adopt a new Chapter 5 with the same title; rescind Chapter 6, “Declaratory Rulings,” and adopt a new Chapter 6, “Declaratory Orders,” and adopt Chapter 11, “Contested Cases,” Iowa Administrative Code.

Chapters 5 and 6 are rescinded and replaced by new chapters which implement changes to the Uniform Rules on Agency Procedure required by the Iowa Administrative Procedure Act as a result of 1998 Iowa Acts, chapter 1202. Chapter 11 also implements the requirements established by 1998 Iowa Acts, chapter 1202.

Interested persons may make written or oral comments on these proposed amendments on or before April 13, 1999. Such written material should be directed to the Superintendent of Banking, Banking Division, Department of Commerce, 200 East Grand Avenue, Suite 300, Des Moines, Iowa 50309. Persons who want to convey their views orally should contact the Superintendent of Banking, Iowa Department of Commerce, at (515)281-4014 or at 200 East Grand Avenue, Suite 300.

Also, a public hearing will be held on Tuesday, April 13, 1999, at 1:30 p.m. in the Banking Division Conference Room at 200 East Grand Avenue. Persons may present their views at this public hearing either orally or in writing. Persons who wish to make oral presentations at the public hearing should contact the Superintendent of Banking by April 12, 1999.

These amendments are intended to implement Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202, and Iowa Code chapter 524.

The following amendments are proposed.

ITEM 1. Rescind 187—Chapter 5 and adopt in lieu thereof the following **new** chapter:

## CHAPTER 5

## PETITIONS FOR RULE MAKING

**187—5.1(17A) Petition for rule making.** Any person may file a petition for rule making with the division at the Iowa Division of Banking, Attn: Rules Coordinator, 200 East Grand, Suite 300, Des Moines, Iowa 50309-1827. A petition is deemed filed when it is received by that office. The division must provide the petitioner with a file-stamped copy of the

BANKING DIVISION[187](cont'd)

petition if the petitioner provides the division an extra copy for this purpose. The petition must be typewritten, or legibly handwritten in ink and must substantially conform to the following form:

IOWA DEPARTMENT OF COMMERCE  
DIVISION OF BANKING

Petition by (Name of  
Petitioner) for the (adoption,  
amendment, or repeal)  
of rules relating to  
(state subject matter). } PETITION FOR  
RULE MAKING

The petition must provide the following information:

1. A statement of the specific rule-making action sought by the petitioner including the text or a summary of the contents of the proposed rule or amendment to a rule and, if it is a petition to amend or repeal a rule, a citation and the relevant language to the particular portion or portions of the rule proposed to be amended or repealed.
2. A citation to any law deemed relevant to the division's authority to take the action urged or to the desirability of that action.
3. A brief summary of petitioner's arguments in support of the action urged in the petition.
4. A brief summary of any data supporting the action urged in the petition.
5. The names and addresses of other persons, or a description of any class of persons, known by petitioner to be affected by or interested in, the proposed action which is the subject of the petition.
6. Any request by petitioner for a meeting provided for by rule 5.4(17A).

**5.1(1)** The petition must be dated and signed by the petitioner or the petitioner's representative. It must also include the name, mailing address, and telephone number of the petitioner and petitioner's representative, and a statement indicating the person to whom communications concerning the petition should be directed.

**5.1(2)** The division may deny a petition because it does not substantially conform to the required form.

**187—5.2(17A) Briefs.** The petitioner may attach a brief to the petition in support of the action urged in the petition. The division may request a brief from the petitioner or from any other person concerning the substance of the petition.

**187—5.3(17A) Inquiries.** Inquiries concerning the status of a petition for rule making may be made to the Iowa Division of Banking, Attn: Rules Coordinator, 200 East Grand, Suite 300, Des Moines, Iowa 50309-1827.

**187—5.4(17A) Division consideration.**

**5.4(1)** Within 14 days after the filing of a petition, the division must submit a copy of the petition and any accompanying brief to the administrative rules coordinator and to the administrative rules review committee. Upon request by petitioner in the petition, the division must schedule a brief and informal meeting between the petitioner and the division, a member of the division, or a member of the staff of the division, to discuss the petition. The division may request the petitioner to submit additional information or argument concerning the petition. The division may also solicit comments from any person on the substance of the petition. Also, comments on the substance of the petition may be submitted to the division by any person.

**5.4(2)** Within 60 days after the filing of the petition, or within any longer period agreed to by the petitioner, the division must, in writing, deny the petition, and notify petitioner of its action and the specific grounds for the denial, or grant the petition and notify petitioner that it has instituted rule-making proceedings on the subject of the petition. Petitioner shall be deemed notified of the denial or grant of the petition on the date when the division mails or delivers the required notification to petitioner.

**5.4(3)** Denial of a petition because it does not substantially conform to the required form does not preclude the filing of a new petition on the same subject that seeks to eliminate the grounds for the division's rejection of the petition.

These rules are intended to implement Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202.

ITEM 2. Rescind 187—Chapter 6 and adopt in lieu thereof the following new chapter:

CHAPTER 6  
DECLARATORY ORDERS

**187—6.1(17A) Petition for declaratory order.** Any person may file a petition with the division of banking for a declaratory order as to the applicability to specified circumstances of a statute, rule, or order within the primary jurisdiction of the division of banking, at the Iowa Division of Banking, Attn: Rules Coordinator, 200 East Grand Avenue, Suite 300, Des Moines, Iowa 50309-1827. A petition is deemed filed when it is received by that office. The division shall provide the petitioner with a file-stamped copy of the petition if the petitioner provides the division an extra copy for this purpose. The petition must be typewritten or legibly handwritten in ink and must substantially conform to the following form:

IOWA DEPARTMENT OF COMMERCE  
DIVISION OF BANKING

Petition by (Name of Petitioner)  
for a Declaratory Order on (Cite  
provisions of law involved). } PETITION FOR  
DECLARATORY  
ORDER

The petition must provide the following information:

1. A clear and concise statement of all relevant facts on which the order is requested.
2. A citation and the relevant language of the specific statutes, rules, policies, decisions, or orders, whose applicability is questioned, and any other relevant law.
3. The questions petitioner wants answered, stated clearly and concisely.
4. The answers to the questions desired by the petitioner and a summary of the reasons urged by the petitioner in support of those answers.
5. The reasons for requesting the declaratory order and disclosure of the petitioner's interest in the outcome.
6. A statement indicating whether the petitioner is currently a party to another proceeding involving the questions at issue and whether, to the petitioner's knowledge, those questions have been decided by, are pending determination by, or are under investigation by, any governmental entity.
7. The names and addresses of other persons, or a description of any class of persons, known by petitioner to be affected by, or interested in, the questions presented in the petition.

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8. Any request by petitioner for a meeting provided for by 6.7(17A).

The petition must be dated and signed by the petitioner or the petitioner's representative. It must also include the name, mailing address, and telephone number of the petitioner and petitioner's representative and a statement indicating the person to whom communications concerning the petition should be directed.

**187—6.2(17A) Notice of petition.** Within 15 days after receipt of a petition for a declaratory order, the division shall give notice of the petition to all persons not served by the petitioner pursuant to 6.6(17A) to whom notice is required by any provision of law. The division may also give notice to any other persons.

**187—6.3(17A) Intervention.**

**6.3(1)** Persons who qualify under any applicable provision of law as an intervenor and who file a petition for intervention within six days of the filing of a petition for declaratory order shall be allowed to intervene in a proceeding for a declaratory order.

**6.3(2)** Any person who files a petition for intervention at any time prior to the issuance of an order may be allowed to intervene in a proceeding for a declaratory order at the discretion of the division of banking.

**6.3(3)** A petition for intervention shall be filed at Iowa Division of Banking, Attn: Rules Coordinator, 200 East Grand Avenue, Suite 300, Des Moines, Iowa 50309-1827. Such a petition is deemed filed when it is received by that office. The division will provide the petitioner with a file-stamped copy of the petition for intervention if the petitioner provides an extra copy for this purpose. A petition for intervention must be typewritten or legibly handwritten in ink and must substantially conform to the following form:

IOWA DEPARTMENT OF COMMERCE  
DIVISION OF BANKING

Petition by (Name of Original Petitioner) for a Declaratory Order on (Cite provisions of law cited in original petition). } PETITION FOR INTERVENTION

The petition for intervention must provide the following information:

1. Facts supporting the intervenor's standing and qualifications for intervention.
2. The answers urged by the intervenor to the question or questions presented and a summary of the reasons urged in support of those answers.
3. Reasons for requesting intervention and disclosure of the intervenor's interest in the outcome.
4. A statement indicating whether the intervenor is currently a party to any proceeding involving the questions at issue and whether, to the intervenor's knowledge, those questions have been decided by, are pending determination by, or are under investigation by, any governmental entity.
5. The names and addresses of any additional persons, or a description of any additional class of persons, known by the intervenor to be affected by, or interested in, the questions presented.
6. Whether the intervenor consents to be bound by the determination of the matters presented in the declaratory order proceeding.

The petition must be dated and signed by the intervenor or the intervenor's representative. It must also include the name, mailing address, and telephone number of the intervenor and intervenor's representative, and a statement indicating the person to whom communications should be directed.

**187—6.4(17A) Briefs.** The petitioner or any intervenor may file a brief in support of the position urged. The division of banking may request a brief from the petitioner, any intervenor, or any other person concerning the questions raised.

**187—6.5(17A) Inquiries.** Inquiries concerning the status of a declaratory order proceeding may be made to Iowa Division of Banking, Attn: Rules Coordinator, 200 East Grand Avenue, Suite 300, Des Moines, Iowa 50309-1827.

**187—6.6(17A) Service and filing of petitions and other papers.**

**6.6(1)** When service required. Except where otherwise provided by law, every petition for declaratory order, petition for intervention, brief, or other paper filed in a proceeding for a declaratory order shall be served upon each of the parties of record to the proceeding, and on all other persons identified in the petition for declaratory order or petition for intervention as affected by or interested in the questions presented, simultaneously with their filing. The party filing a document is responsible for service on all parties and other affected or interested persons.

**6.6(2)** Filing—when required. All petitions for declaratory orders, petitions for intervention, briefs, or other papers in a proceeding for a declaratory order shall be filed with Iowa Division of Banking, Attn: Rules Coordinator, 200 East Grand Avenue, Suite 300, Des Moines, Iowa 50309-1827. All petitions, briefs, or other papers that are required to be served upon a party shall be filed simultaneously with the division.

**6.6(3)** Method of service, time of filing, and proof of mailing. Method of service, time of filing, and proof of mailing shall be as provided by rule on contested cases 11.12(17A).

**187—6.7(17A) Consideration.** Upon request by petitioner, the division of banking must schedule a brief and informal meeting between the original petitioner, all intervenors, and the division of banking, a member of the division of banking, or a member of the staff of the division of banking, to discuss the questions raised. The division may solicit comments from any person on the questions raised. Also, comments on the questions raised may be submitted to the division of banking by any person.

**187—6.8(17A) Action on petition.**

**6.8(1)** Within the time allowed by 1998 Iowa Acts, chapter 1202, section 13(5), after receipt of a petition for a declaratory order, the superintendent or the superintendent's designee shall take action on the petition as required by 1998 Iowa Acts, chapter 1202, section 13(5).

**6.8(2)** The date of issuance of an order or of a refusal to issue an order is as defined in rule on contested cases 11.2(17A).

**187—6.9(17A) Refusal to issue order.**

**6.9(1)** The division shall not issue a declaratory order where prohibited by 1998 Iowa Acts, chapter 1202, section 13(1), and may refuse to issue a declaratory order on some or all questions raised for the following reasons:

1. The petition does not substantially comply with the required form.

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2. The petition does not contain facts sufficient to demonstrate that the petitioner will be aggrieved or adversely affected by the failure of the division to issue an order.

3. The division of banking does not have jurisdiction over the questions presented in the petition.

4. The questions presented by the petition are also presented in a current rule making, contested case, or other division or judicial proceeding, that may definitively resolve them.

5. The questions presented by the petition would more properly be resolved in a different type of proceeding or by another body with jurisdiction over the matter.

6. The facts or questions presented in the petition are unclear, overbroad, insufficient, or otherwise inappropriate as a basis upon which to issue an order.

7. There is no need to issue an order because the questions raised in the petition have been settled due to a change in circumstances.

8. The petition is not based upon facts calculated to aid in the planning of future conduct but is, instead, based solely upon prior conduct in an effort to establish the effect of that conduct or to challenge a division decision already made.

9. The petition requests a declaratory order that would necessarily determine the legal rights, duties, or responsibilities of other persons who have not joined in the petition, intervened separately, or filed a similar petition and whose position on the questions presented may fairly be presumed to be adverse to that of petitioner.

10. The petitioner requests the division of banking to determine whether a statute is unconstitutional on its face.

**6.9(2)** A refusal to issue a declaratory order must indicate the specific grounds for the refusal and constitutes final division action on the petition.

**6.9(3)** Refusal to issue a declaratory order pursuant to this provision does not preclude the filing of a new petition that seeks to eliminate the grounds for the refusal to issue an order.

**187—6.10(17A) Contents of declaratory order—effective date.** In addition to the order itself, a declaratory order must contain the date of its issuance, the name of petitioner and all intervenors, the specific statutes, rules, policies, decisions, or orders involved, the particular facts upon which it is based, and the reasons for its conclusion.

A declaratory order is effective on the date of issuance.

**187—6.11(17A) Copies of orders.** A copy of all orders issued in response to a petition for a declaratory order shall be mailed promptly to the original petitioner and all intervenors.

**187—6.12(17A) Effect of a declaratory order.** A declaratory order has the same status and binding effect as a final order issued in a contested case proceeding. It is binding on the division of banking, the petitioner, and any intervenors and is applicable only in circumstances where the relevant facts and the law involved are indistinguishable from those on which the order was based. As to all other persons, a declaratory order serves only as precedent and is not binding on the division. The issuance of a declaratory order constitutes final division action on the petition.

These rules are intended to implement Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202.

ITEM 3. Adopt the following **new** chapter:

CHAPTER 11  
CONTESTED CASES

**187—11.1(17A) Scope and applicability.** Except when inconsistent with Iowa Code chapter 524, this chapter applies to contested case proceedings conducted by the Iowa Division of Banking.

**187—11.2(17A) Definitions.** Except where otherwise specifically defined by law:

“Contested case” means a proceeding defined by Iowa Code section 17A.2(5) and includes any matter defined as a no factual dispute contested case under 1998 Iowa Acts, chapter 1202, section 14.

“Issuance” means the date of mailing of a decision or order or date of delivery if service is by other means unless another date is specified in the order.

“Party” means each person or agency named or admitted as a party or properly seeking and entitled as of right to be admitted as a party.

“Presiding officer” means the superintendent of banking, the superintendent’s designee or, under certain circumstances, the administrative law judge.

“Proposed decision” means the presiding officer’s recommended findings of fact, conclusions of law, decision, and order in a contested case in which the superintendent did not preside.

**187—11.3(17A) Time requirements.**

**11.3(1)** Time shall be computed as provided in Iowa Code subsection 4.1(34).

**11.3(2)** For good cause, the presiding officer may extend or shorten the time to take any action, except as precluded by statute. Except for good cause stated in the record, before extending or shortening the time to take any action, the presiding officer shall afford all parties an opportunity to be heard or to file written arguments.

**187—11.4(17A) Requests for contested case proceeding.**

Any person claiming an entitlement to a contested case proceeding shall file a written request for such a proceeding within the time specified by the particular rules or statutes governing the subject matter or, in the absence of such law, the time specified in the division action in question. The request for a contested case proceeding should state the name and address of the requester, identify the specific division action which is disputed and, where the requester is represented by a lawyer, identify the provisions of law or precedent requiring or authorizing the holding of a contested case proceeding in the particular circumstances involved, and include a short and plain statement of the issues of material fact in dispute.

**187—11.5(17A) Notice of hearing.**

**11.5(1) Delivery.** Delivery of the notice of hearing constitutes the commencement of the contested case proceeding. Delivery may be executed by:

- a. Personal service as provided in the Iowa Rules of Civil Procedure; or
- b. Certified mail, return receipt requested; or
- c. First-class mail; or
- d. Publication, as provided in the Iowa Rules of Civil Procedure.

**11.5(2) Contents.** The notice of hearing shall contain the following information:

- a. A statement of the time, place, and nature of the hearing;
- b. A statement of the legal authority and jurisdiction under which the hearing is to be held;
- c. A reference to the particular sections of the statutes and rules involved;

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d. A short and plain statement of the matters asserted. If the division or other party is unable to state the matters in detail at the time the notice is served, the initial notice may be limited to a statement of the issues involved. Thereafter, upon application, a more definite and detailed statement shall be furnished;

e. Identification of all parties including the name, address and telephone number of the person who will act as advocate for the division or the state and of parties' counsel where known;

f. Reference to the procedural rules governing conduct of the contested case proceeding;

g. Reference to the procedural rules governing informal settlement;

h. Identification of the presiding officer, if known. If not known, a description of who will serve as presiding officer (e.g., superintendent, superintendent's designee, administrative law judge from the department of inspections and appeals); and

i. Notification of the time period in which a party may request, pursuant to 1998 Iowa Acts, chapter 1202, section 15(1), and rule 11.6(17A), that the presiding officer be an administrative law judge.

**187—11.6(17A) Presiding officer.**

**11.6(1)** Any party who wishes to request that the presiding officer assigned to render a proposed decision be an administrative law judge employed by the department of inspections and appeals must file a written request within 20 days after service of a notice of hearing which identifies or describes the presiding officer as the division head or members of the division.

**11.6(2)** The superintendent may deny the request only upon a finding that one or more of the following apply:

a. Neither the division nor any officer of the division under whose authority the contested case is to take place is a named party to the proceeding or a real party in interest to that proceeding.

b. There is a compelling need to expedite issuance of a final decision in order to protect the public health, safety, or welfare.

c. An administrative law judge with the qualifications identified in subrule 11.6(4) is unavailable to hear the case within a reasonable time.

d. The case involves significant policy issues of first impression that are inextricably intertwined with the factual issues presented.

e. The demeanor of the witnesses is likely to be dispositive in resolving the disputed factual issues.

f. Funds are unavailable to pay the costs of an administrative law judge and an interdivision appeal.

g. The request was not timely filed.

h. The request is not consistent with a specified statute.

**11.6(3)** The superintendent shall issue a written ruling specifying the grounds for the decision within 20 days after a request for an administrative law judge is filed. If the ruling is contingent upon the availability of an administrative law judge with the qualifications identified in subrule 11.6(4), the parties shall be notified at least 10 days prior to hearing if a qualified administrative law judge will not be available.

**11.6(4)** An administrative law judge assigned to act as presiding officer shall have the following technical expertise unless waived by the division: an administrative law judge shall have at least five years' experience as an executive officer in a bank or in the regulation or examination of banks.

**11.6(5)** Except as provided otherwise by another provision of law, all rulings by an administrative law judge acting as presiding officer are subject to appeal to the superintendent. A party must seek any available intradivision appeal in order to exhaust adequate administrative remedies.

**11.6(6)** Unless otherwise provided by law, the superintendent, when reviewing a proposed decision upon intradivision appeal, shall have the powers of and shall comply with the provisions of this chapter which apply to presiding officers.

**187—11.7(17A) Waiver of procedures.** Unless otherwise precluded by law, the parties in a contested case proceeding may waive any provision of this chapter. However, the division in its discretion may refuse to give effect to such a waiver when it deems the waiver to be inconsistent with the public interest.

**187—11.8(17A) Telephone proceedings.** The presiding officer may resolve preliminary procedural motions by telephone conference in which all parties have an opportunity to participate. Other telephone proceedings may be held with the consent of all parties. The presiding officer will determine the location of the parties and witnesses for telephone hearings. The convenience of the witnesses or parties, as well as the nature of the case, will be considered when location is chosen.

**187—11.9(17A) Disqualification.**

**11.9(1)** A presiding officer or other person shall withdraw from participation in the making of any proposed or final decision in a contested case if that person:

a. Has a personal bias or prejudice concerning a party or a representative of a party;

b. Has personally investigated, prosecuted or advocated in connection with that case, the specific controversy underlying that case, another pending factually related contested case, or a pending factually related controversy that may culminate in a contested case involving the same parties;

c. Is subject to the authority, direction or discretion of any person who has personally investigated, prosecuted or advocated in connection with that contested case, the specific controversy underlying that contested case, or a pending factually related contested case or controversy involving the same parties;

d. Has acted as counsel to any person who is a private party to that proceeding within the past two years;

e. Has a personal financial interest in the outcome of the case or any other significant personal interest that could be substantially affected by the outcome of the case;

f. Has a spouse or relative within the third degree of relationship that (1) is a party to the case, or an officer, director or trustee of a party; (2) is a lawyer in the case; (3) is known to have an interest that could be substantially affected by the outcome of the case; or (4) is likely to be a material witness in the case; or

g. Has any other legally sufficient cause to withdraw from participation in the decision making in that case.

**11.9(2)** The term "personally investigated" means taking affirmative steps to interview witnesses directly or to obtain documents or other information directly. The term "personally investigated" does not include general direction and supervision of assigned investigators, unsolicited receipt of information which is relayed to assigned investigators, review of another person's investigative work product in the course of determining whether there is probable cause to initiate a proceeding, or exposure to factual information while performing other division functions, including fact gathering for purposes other than investigation of the matter which cul-

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minates in a contested case. Factual information relevant to the merits of a contested case received by a person who later serves as presiding officer in that case shall be disclosed if required by Iowa Code section 17A.17 as amended by 1998 Iowa Acts, chapter 1202, section 19, and subrules 11.9(3) and 11.23(9).

**11.9(3)** In a situation where a presiding officer or other person knows of information which might reasonably be deemed to be a basis for disqualification and decides voluntary withdrawal is unnecessary, that person shall submit the relevant information for the record by affidavit and shall provide for the record a statement of the reasons for the determination that withdrawal is unnecessary.

**11.9(4)** If a party asserts disqualification on any appropriate ground, including those listed in subrule 11.9(1), the party shall file a motion supported by an affidavit pursuant to 1998 Iowa Acts, chapter 1202, section 19(7). The motion must be filed as soon as practicable after the reason alleged in the motion becomes known to the party.

If, during the course of the hearing, a party first becomes aware of evidence of bias or other grounds for disqualification, the party may move for disqualification but must establish the grounds by the introduction of evidence into the record.

If the presiding officer determines that disqualification is appropriate, the presiding officer or other person shall withdraw. If the presiding officer determines that withdrawal is not required, the presiding officer shall enter an order to that effect. A party asserting disqualification may seek an interlocutory appeal under rule 11.25(17A) and seek a stay under rule 11.29(17A).

**187—11.10(17A) Consolidation—severance.**

**11.10(1)** Consolidation. The presiding officer may consolidate any or all matters at issue in two or more contested case proceedings where (a) the matters at issue involve common parties or common questions of fact or law; (b) consolidation would expedite and simplify consideration of the issues involved; and (c) consolidation would not adversely affect the rights of any of the parties to those proceedings.

**11.10(2)** Severance. The presiding officer may, for good cause shown, order any contested case proceedings or portions thereof severed.

**187—11.11(17A) Pleadings.**

**11.11(1)** Petition. A petition in a contested case proceeding shall state in separately numbered paragraphs the following:

- a. The persons or entities on whose behalf the petition is filed;
- b. The particular provisions of statutes and rules involved;
- c. The relief demanded and the facts and law relied upon for such relief; and
- d. The name, address and telephone number of the petitioner and the petitioner's attorney, if any.

**11.11(2)** Answer. An answer shall be filed within 20 days of service of a petition unless otherwise ordered. A party may move to dismiss or apply for a more definite and detailed statement when appropriate.

An answer shall show on whose behalf it is filed and specifically admit, deny, or otherwise answer all material allegations of the pleading to which it responds. It shall state any facts deemed to show an affirmative defense and contain as many additional defenses as the pleader may claim.

An answer shall state the name, address and telephone number of the person filing the answer, the person or entity

on whose behalf it is filed, and the attorney representing that person, if any.

Any allegation in the petition not denied in the answer is considered admitted. The presiding officer may refuse to consider any defense not raised in the answer which could have been raised on the basis of facts known when the answer was filed if any party would be prejudiced.

**11.11(3)** Amendment. Any notice of hearing, petition, or other charging document may be amended before a responsive pleading has been filed. Amendments to pleadings after a responsive pleading has been filed and to an answer may be allowed with the consent of the other parties or in the discretion of the presiding officer who may impose terms or grant a continuance.

**187—11.12(17A) Service and filing of pleadings and other papers.**

**11.12(1)** When service required. Except where otherwise provided by law, every pleading, motion, document, or other paper filed in a contested case proceeding and every paper relating to discovery in such a proceeding shall be served upon each of the parties of record to the proceeding, including the person designated as advocate or prosecutor for the state or the division, simultaneously with their filing. Except for the original notice of hearing and an application for rehearing as provided in Iowa Code section 17A.16(2), the party filing a document is responsible for service on all parties.

**11.12(2)** Service—how made. Service upon a party represented by an attorney shall be made upon the attorney unless otherwise ordered. Service is made by delivery or by mailing a copy to the person's last-known address. Service by mail is complete upon mailing, except where otherwise specifically provided by statute, rule, or order.

**11.12(3)** Filing—when required. After the notice of hearing, all pleadings, motions, documents or other papers in a contested case proceeding shall be filed with Iowa Division of Banking, Attn: Deputy Superintendent, 200 East Grand Avenue, Suite 300, Des Moines, Iowa 50309-1827. All pleadings, motions, documents or other papers that are required to be served upon a party shall be filed simultaneously with the Iowa division of banking.

**11.12(4)** Filing—when made. Except where otherwise provided by law, a document is deemed filed at the time it is delivered to the division of banking, delivered to an established courier service for immediate delivery to that office, or mailed by first-class mail or state interoffice mail to that office, so long as there is proof of mailing.

**11.12(5)** Proof of mailing. Proof of mailing includes either a legible United States Postal Service postmark on the envelope, a certificate of service, a notarized affidavit, or a certification in substantially the following form:

I certify under penalty of perjury and pursuant to the laws of Iowa that, on (date of mailing), I mailed copies of (describe document) addressed to the Iowa Division of Banking, Attn: Deputy Superintendent, 200 East Grand Avenue, Suite 300, Des Moines, Iowa 50309-1827 and to the names and addresses of the parties listed below by depositing the same in (a United States post office mailbox with correct postage properly affixed or state interoffice mail).

(Date) (Signature)

**187—11.13(17A) Discovery.**

**11.13(1)** Discovery procedures applicable in civil actions are applicable in contested cases. Unless lengthened or shortened by these rules or by order of the presiding officer,

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time periods for compliance with discovery shall be as provided in the Iowa Rules of Civil Procedure.

**11.13(2)** Any motion relating to discovery shall allege that the moving party has previously made a good-faith attempt to resolve the discovery issues involved with the opposing party. Motions in regard to discovery shall be ruled upon by the presiding officer. Opposing parties shall be afforded the opportunity to respond within ten days of the filing of the motion unless the time is shortened as provided in subrule 11.13(1). The presiding officer may rule on the basis of the written motion and any response, or may order argument on the motion.

**11.13(3)** Evidence obtained in discovery may be used in the contested case proceeding if that evidence would otherwise be admissible in that proceeding.

**187—11.14(17A) Subpoenas.****11.14(1) Issuance.**

a. A division subpoena shall be issued to a party on request. Such a request must be in writing. In the absence of good cause for permitting later action, a request for a subpoena must be received at least three days before the scheduled hearing. The request shall include the name, address, and telephone number of the requesting party.

b. Except to the extent otherwise provided by law, parties are responsible for service of their own subpoenas and payment of witness fees and mileage expenses.

**11.14(2)** Motion to quash or modify. The presiding officer may quash or modify a subpoena for any lawful reason upon motion in accordance with the Iowa Rules of Civil Procedure. A motion to quash or modify a subpoena shall be set for argument promptly.

**187—11.15(17A) Motions.**

**11.15(1)** No technical form for motions is required. However, prehearing motions must be in writing, state the grounds for relief, and state the relief sought.

**11.15(2)** Any party may file a written response to a motion within ten days after the motion is served, unless the time period is extended or shortened by rules of the division or the presiding officer. The presiding officer may consider a failure to respond within the required time period in ruling on a motion.

**11.15(3)** The presiding officer may schedule oral argument on any motion.

**11.15(4)** Motions pertaining to the hearing must be filed and served at least ten days prior to the date of hearing unless there is good cause for permitting later action or the time for such action is lengthened or shortened by rule of the division or an order of the presiding officer.

**187—11.16(17A) Prehearing conference.**

**11.16(1)** Any party may request a prehearing conference. A written request for prehearing conference or an order for prehearing conference on the presiding officer's own motion shall be filed not less than seven days prior to the hearing date. A prehearing conference shall be scheduled not less than three business days prior to the hearing date.

Written notice of the prehearing conference shall be given by the presiding officer to all parties. For good cause the presiding officer may permit variances from this rule.

**11.16(2)** Each party shall bring to the prehearing conference:

a. A final list of the witnesses who the party anticipates will testify at hearing. Witnesses not listed may be excluded from testifying unless there was good cause for the failure to include their names; and

b. A final list of exhibits which the party anticipates will be introduced at hearing. Exhibits other than rebuttal exhibits that are not listed may be excluded from admission into evidence unless there was good cause for the failure to include them.

c. Witness or exhibit lists may be amended subsequent to the prehearing conference within the time limits established by the presiding officer at the prehearing conference. Any such amendments must be served on all parties.

**11.16(3)** In addition to the requirements of subrule 11.16(2), the parties at a prehearing conference may:

a. Enter into stipulations of law or fact;

b. Enter into stipulations on the admissibility of exhibits;

c. Identify matters which the parties intend to request be officially noticed;

d. Enter into stipulations for waiver of any provision of law; and

e. Consider any additional matters which will expedite the hearing.

**11.16(4)** Prehearing conferences shall be conducted by telephone unless otherwise ordered. Parties shall exchange and receive witness and exhibit lists in advance of a telephone prehearing conference.

**187—11.17(17A) Continuances.** Unless otherwise provided, applications for continuances shall be made to the presiding officer.

**11.17(1)** A written application for a continuance shall:

a. Be made at the earliest possible time and no less than seven days before the hearing except in case of unanticipated emergencies;

b. State the specific reasons for the request; and

c. Be signed by the requesting party or the party's representative.

An oral application for a continuance may be made if the presiding officer waives the requirement for a written motion. However, a party making such an oral application for a continuance must confirm that request by written application within five days after the oral request unless that requirement is waived by the presiding officer. No application for continuance shall be made or granted without notice to all parties except in an emergency where notice is not feasible. The division may waive notice of such requests for a particular case or an entire class of cases.

**11.17(2)** In determining whether to grant a continuance, the presiding officer may consider:

a. Prior continuances;

b. The interests of all parties;

c. The likelihood of informal settlement;

d. The existence of an emergency;

e. Any objection;

f. Any applicable time requirements;

g. The existence of a conflict in the schedules of counsel, parties, or witnesses;

h. The timeliness of the request; and

i. Other relevant factors.

The presiding officer may require documentation of any grounds for continuance.

**187—11.18(17A) Withdrawals.** A party requesting a contested case proceeding may withdraw that request prior to the hearing only in accordance with division rules. Unless otherwise provided, a withdrawal shall be with prejudice.

**187—11.19(17A) Intervention.**

**11.19(1)** Motion. A motion for leave to intervene in a contested case proceeding shall state the grounds for the pro-

## BANKING DIVISION[187](cont'd)

posed intervention, the position and interest of the proposed intervenor, and the possible impact of intervention on the proceeding. A proposed answer or petition in intervention shall be attached to the motion. Any party may file a response within 14 days of service of the motion to intervene unless the time period is extended or shortened by the presiding officer.

**11.19(2)** When filed. Motion for leave to intervene shall be filed as early in the proceeding as possible to avoid adverse impact on existing parties or the conduct of the proceeding. Unless otherwise ordered, a motion for leave to intervene shall be filed before the prehearing conference, if any, or at least 20 days before the date scheduled for hearing. Any later motion must contain a statement of good cause for the failure to file in a timely manner. Unless inequitable or unjust, an intervenor shall be bound by any agreement, arrangement, or other matter previously raised in the case. Requests by untimely intervenors for continuances which would delay the proceeding will ordinarily be denied.

**11.19(3)** Grounds for intervention. The movant shall demonstrate that (a) intervention would not unduly prolong the proceedings or otherwise prejudice the rights of existing parties; (b) the movant is likely to be aggrieved or adversely affected by a final order in the proceeding; and (c) the interests of the movant are not adequately represented by existing parties.

**11.19(4)** Effect of intervention. If appropriate, the presiding officer may order consolidation of the petitions and briefs of different parties whose interests are aligned with each other and limit the number of representatives allowed to participate actively in the proceedings. A person granted leave to intervene is a party to the proceeding. The order granting intervention may restrict the issues that may be raised by the intervenor or otherwise condition the intervenor's participation in the proceeding.

**187—11.20(17A) Hearing procedures.**

**11.20(1)** The presiding officer presides at the hearing, and may rule on motions, require briefs, issue a proposed decision, and issue such orders and rulings as will ensure the orderly conduct of the proceedings.

**11.20(2)** All objections shall be timely made and stated on the record.

**11.20(3)** Parties have the right to participate or to be represented in all hearings or prehearing conferences related to their case. Partnerships, corporations, or associations may be represented by any member, officer, director, or duly authorized agent. Any party may be represented by an attorney or another person authorized by law.

**11.20(4)** Subject to terms and conditions prescribed by the presiding officer, parties have the right to introduce evidence on issues of material fact, cross-examine witnesses present at the hearing as necessary for a full and true disclosure of the facts, present evidence in rebuttal, and submit briefs and engage in oral argument.

**11.20(5)** The presiding officer shall maintain the decorum of the hearing and may refuse to admit or may expel anyone whose conduct is disorderly.

**11.20(6)** Witnesses may be sequestered during the hearing.

**11.20(7)** The presiding officer shall conduct the hearing in the following manner:

a. The presiding officer shall give an opening statement briefly describing the nature of the proceedings;

b. The parties shall be given an opportunity to present opening statements;

c. Parties shall present their cases in the sequence determined by the presiding officer;

d. Each witness shall be sworn or affirmed by the presiding officer or the court reporter, and be subject to examination and cross-examination. The presiding officer may limit questioning in a manner consistent with law;

e. When all parties and witnesses have been heard, parties may be given the opportunity to present final arguments.

**187—11.21(17A) Evidence.**

**11.21(1)** The presiding officer shall rule on admissibility of evidence and may, where appropriate, take official notice of facts in accordance with all applicable requirements of law.

**11.21(2)** Stipulation of facts is encouraged. The presiding officer may make a decision based on stipulated facts.

**11.21(3)** Evidence in the proceeding shall be confined to the issues as to which the parties received notice prior to the hearing unless the parties waive their right to such notice or the presiding officer determines that good cause justifies expansion of the issues. If the presiding officer decides to admit evidence on issues outside the scope of the notice over the objection of a party who did not have actual notice of those issues, that party, upon timely request, shall receive a continuance sufficient to amend pleadings and to prepare on the additional issue.

**11.21(4)** The party seeking admission of an exhibit must provide opposing parties with an opportunity to examine the exhibit prior to the ruling on its admissibility. Copies of documents should normally be provided to opposing parties.

All exhibits admitted into evidence shall be appropriately marked and be made part of the record.

**11.21(5)** Any party may object to specific evidence or may request limits on the scope of any examination or cross-examination. Such an objection shall be accompanied by a brief statement of the grounds upon which it is based. The objection, the ruling on the objection, and the reasons for the ruling shall be noted in the record. The presiding officer may rule on the objection at the time it is made or may reserve a ruling until the written decision.

**11.21(6)** Whenever evidence is ruled inadmissible, the party offering that evidence may submit an offer of proof on the record. The party making the offer of proof for excluded oral testimony shall briefly summarize the testimony or, with permission of the presiding officer, present the testimony. If the excluded evidence consists of a document or exhibit, it shall be marked as part of an offer of proof and inserted in the record.

**187—11.22(17A) Default.**

**11.22(1)** If a party fails to appear or participate in a contested case proceeding after proper service of notice, the presiding officer may, if no adjournment is granted, enter a default decision or proceed with the hearing and render a decision in the absence of the party.

**11.22(2)** Where appropriate and not contrary to law, any party may move for default against a party who has requested the contested case proceeding and has failed to file a required pleading or has failed to appear after proper service.

**11.22(3)** Default decisions or decisions rendered on the merits after a party has failed to appear or participate in a contested case proceeding become final division action unless, within 15 days after the date of notification or mailing of the decision, a motion to vacate is filed and served on all parties or an appeal of a decision on the merits is timely initiated within the time provided by rule 11.27(17A). A motion to vacate must state all facts relied upon by the moving party

## BANKING DIVISION[187](cont'd)

which establish that good cause existed for that party's failure to appear or participate at the contested case proceeding. Each fact so stated must be substantiated by at least one sworn affidavit of a person with personal knowledge of each such fact, which affidavit(s) must be attached to the motion.

**11.22(4)** The time for further appeal of a decision for which a timely motion to vacate has been filed is stayed pending a decision on the motion to vacate.

**11.22(5)** Properly substantiated and timely filed motions to vacate shall be granted only for good cause shown. The burden of proof as to good cause is on the moving party. Adverse parties shall have ten days to respond to a motion to vacate. Adverse parties shall be allowed to conduct discovery as to the issue of good cause and to present evidence on the issue prior to a decision on the motion, if a request to do so is included in that party's response.

**11.22(6)** "Good cause" for purposes of this rule shall have the same meaning as "good cause" for setting aside a default judgment under Iowa Rule of Civil Procedure 236.

**11.22(7)** A decision denying a motion to vacate is subject to further appeal within the time limit allowed for further appeal of a decision on the merits in the contested case proceeding. A decision granting a motion to vacate is subject to interlocutory appeal by the adverse party pursuant to rule 11.25(17A).

**11.22(8)** If a motion to vacate is granted and no timely interlocutory appeal has been taken, the presiding officer shall issue another notice of hearing and the contested case shall proceed accordingly.

**11.22(9)** A default decision may award any relief consistent with the request for relief made in the petition and embraced in its issues.

**11.22(10)** A default decision may provide either that the default decision is to be stayed pending a timely motion to vacate or that the default decision is to take effect immediately, subject to a request for stay under rule 11.29(17A).

**187—11.23(17A) Ex parte communication.**

**11.23(1)** Prohibited communications. Unless required for the disposition of ex parte matters specifically authorized by statute, following issuance of the notice of hearing, there shall be no communication, directly or indirectly, between the presiding officer and any party or representative of any party or any other person with a direct or indirect interest in such case in connection with any issue of fact or law in the case except upon notice and opportunity for all parties to participate. This does not prohibit persons jointly assigned such tasks from communicating with each other. Nothing in this provision is intended to preclude the presiding officer from communicating with members of the division or seeking the advice or help of persons other than those with a personal interest in, or those engaged in personally investigating as defined in subrule 11.9(2), prosecuting, or advocating in, either the case under consideration or a pending factually related case involving the same parties as long as those persons do not directly or indirectly communicate to the presiding officer any ex parte communications they have received of a type that the presiding officer would be prohibited from receiving or that furnish, augment, diminish, or modify the evidence in the record.

**11.23(2)** Prohibitions on ex parte communications commence with the issuance of the notice of hearing in a contested case and continue for as long as the case is pending.

**11.23(3)** Written, oral or other forms of communication are "ex parte" if made without notice and opportunity for all parties to participate.

**11.23(4)** To avoid prohibited ex parte communications, notice must be given in a manner reasonably calculated to give all parties a fair opportunity to participate. Notice of written communications shall be provided in compliance with rule 11.12(17A) and may be supplemented by telephone, facsimile, electronic mail or other means of notification. Where permitted, oral communications may be initiated through conference telephone call including all parties or their representatives.

**11.23(5)** Persons who jointly act as presiding officer in a pending contested case may communicate with each other without notice or opportunity for parties to participate.

**11.23(6)** The executive director or other persons may be present in deliberations or otherwise advise the presiding officer without notice or opportunity for parties to participate as long as they are not disqualified from participating in the making of a proposed or final decision under any provision of law and they comply with subrule 11.23(1).

**11.23(7)** Communications with the presiding officer involving uncontested scheduling or procedural matters do not require notice or opportunity for parties to participate. Parties should notify other parties prior to initiating such contact with the presiding officer when feasible, and shall notify other parties when seeking to continue hearings or other deadlines pursuant to rule 11.17(17A).

**11.23(8)** Disclosure of prohibited communications. A presiding officer who receives a prohibited ex parte communication during the pendency of a contested case must initially determine if the effect of the communication is so prejudicial that the presiding officer should be disqualified. If the presiding officer determines that disqualification is warranted, a copy of any prohibited written communication, all written responses to the communication, a written summary stating the substance of any prohibited oral or other communication not available in written form for disclosure, all responses made, and the identity of each person from whom the presiding officer received a prohibited ex parte communication shall be submitted for inclusion in the record under seal by protective order. If the presiding officer determines that disqualification is not warranted, such documents shall be submitted for inclusion in the record and served on all parties. Any party desiring to rebut the prohibited communication must be allowed the opportunity to do so upon written request filed within ten days after notice of the communication.

**11.23(9)** Promptly after being assigned to serve as presiding officer at any stage in a contested case proceeding, a presiding officer shall disclose to all parties material factual information received through ex parte communication prior to such assignment unless the factual information has already been or shortly will be disclosed pursuant to Iowa Code section 17A.13(2) or through discovery. Factual information contained in an investigative report or similar document need not be separately disclosed by the presiding officer as long as such documents have been or will shortly be provided to the parties.

**11.23(10)** The presiding officer may render a proposed or final decision imposing appropriate sanctions for violations of this rule including default, a decision against the offending party, censure, or suspension or revocation of the privilege to practice before the division. Violation of ex parte communication prohibitions by division personnel shall be reported to the superintendent for possible sanctions including censure, suspension, dismissal, or other disciplinary action.

## BANKING DIVISION[187](cont'd)

**187—11.24(17A) Recording costs.** Upon request, the division shall provide a copy of the whole or any portion of the record at cost. The cost of preparing a copy of the record or of transcribing the hearing record shall be paid by the requesting party.

Parties who request that a hearing be recorded by certified shorthand reporters rather than by electronic means shall bear the cost of that recordation, unless otherwise provided by law.

**187—11.25(17A) Interlocutory appeals.** Upon written request of a party or on its own motion, the superintendent may review an interlocutory order of the presiding officer. In determining whether to do so, the superintendent shall weigh the extent to which its granting the interlocutory appeal would expedite final resolution of the case and the extent to which review of that interlocutory order by the division at the time it reviews the proposed decision of the presiding officer would provide an adequate remedy. Any request for interlocutory review must be filed within 14 days of issuance of the challenged order, but no later than the time for compliance with the order or the date of hearing, whichever is first.

**187—11.26(17A) Final decision.**

**11.26(1)** When the superintendent presides over the reception of evidence at the hearing, the superintendent's decision is a final decision.

**11.26(2)** When the superintendent does not preside at the reception of evidence, the presiding officer shall make a proposed decision. The proposed decision becomes the final decision of the division without further proceedings unless there is an appeal to, or review on motion of, the superintendent within the time provided in rule 11.27(17A).

**187—11.27(17A) Appeals and review.**

**11.27(1)** Appeal by party. Any adversely affected party may appeal a proposed decision to the superintendent within 30 days after issuance of the proposed decision.

**11.27(2)** Review. The superintendent may initiate review of a proposed decision on the superintendent's own motion at any time within 30 days following the issuance of such a decision.

**11.27(3)** Notice of appeal. An appeal of a proposed decision is initiated by filing a timely notice of appeal with the Iowa division of banking. The notice of appeal must be signed by the appealing party or a representative of that party and contain a certificate of service. The notice shall specify:

- a. The parties initiating the appeal;
- b. The proposed decision or order appealed from;
- c. The specific findings or conclusions to which exception is taken and any other exceptions to the decision or order;
- d. The relief sought;
- e. The grounds for relief.

**11.27(4)** Requests to present additional evidence. A party may request the taking of additional evidence only by establishing that the evidence is material, that good cause existed for the failure to present the evidence at the hearing, and that the party has not waived the right to present the evidence. A written request to present additional evidence must be filed with the notice of appeal or, by a nonappealing party, within 14 days of service of the notice of appeal. The superintendent may remand a case to the presiding officer for further hearing or may personally preside at the taking of additional evidence.

**11.27(5)** Scheduling. The division shall issue a schedule for consideration of the appeal.

**11.27(6)** Briefs and arguments. Unless otherwise ordered, within 20 days of the notice of appeal or order for review, each appealing party may file exceptions and briefs. Within 20 days thereafter, any party may file a responsive brief. Briefs shall cite any applicable legal authority and specify relevant portions of the record in that proceeding. Written requests to present oral argument shall be filed with the briefs.

The superintendent may resolve the appeal on the briefs or provide an opportunity for oral argument. The superintendent may shorten or extend the briefing period as appropriate.

**187—11.28(17A) Applications for rehearing.**

**11.28(1)** By whom filed. Any party to a contested case proceeding may file an application for rehearing from a final order.

**11.28(2)** Content of application. The application for rehearing shall state on whose behalf it is filed, the specific grounds for rehearing, and the relief sought. In addition, the application shall state whether the applicant desires reconsideration of all or part of the division decision on the existing record and whether, on the basis of the grounds enumerated in subrule 11.27(4), the applicant requests an opportunity to submit additional evidence.

**11.28(3)** Time of filing. The application shall be filed with the Iowa division of banking within 20 days after issuance of the final decision.

**11.28(4)** Notice to other parties. A copy of the application shall be timely mailed by the applicant to all parties of record not joining therein. If the application does not contain a certificate of service, the Iowa division of banking shall serve copies on all parties.

**11.28(5)** Disposition. Any application for a rehearing shall be deemed denied unless the division grants the application within 20 days after its filing.

**187—11.29(17A) Stays of division actions.**

**11.29(1)** When available.

a. Any party to a contested case proceeding may petition the Iowa division of banking for a stay of an order issued in that proceeding or for other temporary remedies, pending review by the division. The petition shall be filed with the notice of appeal and shall state the reasons justifying a stay or other temporary remedy. The superintendent may rule on the stay or authorize the presiding officer to do so.

b. Any party to a contested case proceeding may petition the Iowa division of banking for a stay or other temporary remedies pending judicial review of all or part of that proceeding. The petition shall state the reasons justifying a stay or other temporary remedy.

**11.29(2)** When granted. In determining whether to grant a stay, the presiding officer or superintendent shall consider the factors listed in 1998 Iowa Acts, chapter 1202, section 23(5c).

**11.29(3)** Vacation. A stay may be vacated by the issuing authority upon application of the division or any other party.

**187—11.30(17A) No factual dispute contested cases.** If the parties agree that no dispute of material fact exists as to a matter that would be a contested case if such a dispute of fact existed, the parties may present all relevant admissible evidence either by stipulation or otherwise as agreed by the parties, without necessity for the production of evidence at an evidentiary hearing. If such agreement is reached, a jointly submitted schedule detailing the method and timetable for submission of the record, briefs and oral argument should be submitted to the presiding officer for approval as soon as

## BANKING DIVISION[187](cont'd)

practicable. If the parties cannot agree, any party may file and serve a motion for summary judgment pursuant to the rules governing such motions.

**187—11.31(17A) Emergency adjudicative proceedings.**

**11.31(1) Necessary emergency action.** To the extent necessary to prevent or avoid immediate danger to the public health, safety, or welfare and, consistent with the Constitution and other provisions of law, the superintendent may issue a written order in compliance with 1998 Iowa Acts, chapter 1202, section 21, to suspend a license in whole or in part, order the cessation of any continuing activity, order affirmative action, or take other action within the jurisdiction of the superintendent by emergency adjudicative order. Before issuing an emergency adjudicative order the superintendent shall consider factors including, but not limited to, the following:

a. Whether there has been a sufficient factual investigation to ensure that the division is proceeding on the basis of reliable information;

b. Whether the specific circumstances which pose immediate danger to the public health, safety or welfare have been identified and determined to be continuing;

c. Whether the person required to comply with the emergency adjudicative order may continue to engage in other activities without posing immediate danger to the public health, safety or welfare;

d. Whether imposition of monitoring requirements or other interim safeguards would be sufficient to protect the public health, safety or welfare; and

e. Whether the specific action contemplated by the division is necessary to avoid the immediate danger.

**11.31(2) Issuance of order.**

a. An emergency adjudicative order shall contain findings of fact, conclusions of law, and policy reasons to justify the determination of an immediate danger in the superintendent's decision to take immediate action.

b. The written emergency adjudicative order shall be immediately delivered to persons who are required to comply with the order by utilizing one or more of the following procedures:

(1) Personal delivery;

(2) Certified mail, return receipt requested, to the last address on file with the division;

(3) Certified mail to the last address on file with the division;

(4) First-class mail to the last address on file with the division; or

(5) Fax. Fax may be used as the sole method of delivery if the person required to comply with the order has filed a written request that division orders be sent by fax and has provided a fax number for that purpose.

c. To the degree practicable, the division shall select the procedure for providing written notice that best ensures prompt, reliable delivery.

**11.31(3) Oral notice.** Unless the written emergency adjudicative order is provided by personal delivery on the same day that the order issues, the division shall make reasonable immediate efforts to contact by telephone the persons who are required to comply with the order.

**11.31(4) Completion of proceedings.** After the issuance of an emergency adjudicative order, the division shall proceed as quickly as feasible to complete any proceedings that would be required if the matter did not involve an immediate danger.

Issuance of a written emergency adjudicative order shall include notification of the date on which division proceedings are scheduled for completion. After issuance of an emergency adjudicative order, continuance of further division proceedings to a later date will be granted only in compelling circumstances upon application in writing.

These rules are intended to implement Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202.

**ARC 8824A****CITY FINANCE COMMITTEE[545]****Notice of Intended Action**

Twenty-five interested persons, a governmental subdivision, an agency or association of 25 or more persons may demand an oral presentation hereon as provided in Iowa Code section 17A.4(1)"b."

Notice is also given to the public that the Administrative Rules Review Committee may, on its own motion or on written request by any individual or group, review this proposed action under section 17A.8(6) at a regular or special meeting where the public or interested persons may be heard.

Pursuant to the authority of Iowa Code section 384.15(1), the City Finance Committee gives Notice of Intended Action to rescind Chapter 6, "Declaratory Rulings," and to adopt a new Chapter 6, "Declaratory Orders," and to amend Chapter 7, "Agency Procedure for Rule Making," Iowa Administrative Code.

The proposed amendments bring the Committee's rules on administrative rule making and declaratory orders into conformance with 1998 Iowa Acts, chapter 1202, which amended the Iowa Administrative Procedure Act.

The Committee's proposed amendments to its rules are based on the amendments to the Uniform Rules on Agency Procedure drafted by a task force from the Attorney General's Office and published in the first volume of the Iowa Administrative Code and the Iowa Administrative Bulletin on February 24, 1999.

Interested persons may make written comments or suggestions on the proposed amendments on or before April 13, 1999. Written materials should be addressed to the City Finance Committee, State Capitol, Room 12, Des Moines, Iowa 50319-0015, or faxed to (515)242-5897. E-mail may be sent to Ron.Amosson@idom.state.ia.us.

These amendments are intended to implement Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202, and Iowa Code section 25B.6.

The following amendments are proposed.

ITEM 1. Rescind 545—Chapter 6 and insert the following new 545—Chapter 6 in lieu thereof:

CHAPTER 6  
DECLARATORY ORDERS

The city finance committee incorporates the declaratory orders segment of the Uniform Rules on Agency Procedure which is printed in the first volume of the Iowa Administrative Code with the following amendments.

**545—6.1(17A) Petition for declaratory order.** In lieu of the words "(designate agency)", insert "committee". In lieu of the words "(designate office)", insert "the City Finance Committee, State Capitol, Room 12, Des Moines, Iowa 50319-0015". In lieu of the words "(AGENCYNAME)", the heading on the petition form should read:

## CITY FINANCE COMMITTEE[545](cont'd)

## BEFORE THE CITY FINANCE COMMITTEE

**545—6.2(17A) Notice of petition.** In lieu of the words “     days (15 or less)”, insert “15 days”. In lieu of the words “(designate agency)”, insert “committee”.

**545—6.3(17A) Intervention.**

**6.3(1)** In lieu of the words “within      days”, insert “within 15 days”. Strike the words “(after time for notice under X.2(17A))”. In lieu of the number “X.8(17A)”, insert “6.8(17A)”.

**6.3(2)** In lieu of the words “(designate agency)”, insert “the committee”.

**6.3(3)** In lieu of the words “(designate office)”, insert “the City Finance Committee, State Capitol, Room 12, Des Moines, Iowa 50319-0015”. In lieu of the words “(designate agency)”, insert “committee”. In lieu of the words “(AGENCY NAME)”, the heading on the petition form should read:

## BEFORE THE CITY FINANCE COMMITTEE

**545—6.4(17A) Briefs.** In lieu of the words “(designate agency)”, insert “committee”.

**545—6.5(17A) Inquiries.** In lieu of the words “(designate official by full title and address)”, insert “the City Finance Committee, State Capitol, Room 12, Des Moines, Iowa 50319-0015”.

**545—6.6(17A) Service and filing of petitions and other papers.**

**6.6(2)** In lieu of the words “(specify office and address)”, insert “the City Finance Committee, State Capitol, Room 12, Des Moines, Iowa 50319-0015”. In lieu of the words “(agency name)”, insert “committee”.

**6.6(3)** In lieu of the words “(uniform rule on contested cases X.12(17A))”, insert “rule 481—10.12(17A)”.

**545—6.7(17A) Consideration.** In lieu of the words “(designate agency)”, insert “committee”.

**545—6.8(17A) Action on petition.**

**6.8(1)** In lieu of the words “(designate agency head)”, insert “city finance committee”.

**6.8(2)** In lieu of the words “(contested case uniform rule X.2(17A))”, insert “rule 481—10.1(10A)”.

**545—6.9(17A) Refusal to issue order.**

**6.9(1)** In lieu of the words “(designate agency)”, insert “committee”.

**545—6.12(17A) Effect of a declaratory order.** In lieu of the words “(designate agency)”, insert “committee”.

These rules are intended to implement 1998 Iowa Acts, chapter 1202, section 13.

ITEM 2. Amend rule 545—7.5(17A) by inserting the following **new** subrule:

**7.5(5) Accessibility.** In lieu of the words “(designate office and telephone number)”, insert “the city finance committee at (515)281-3705”.

ITEM 3. Amend rule 545—7.6(17A), catchwords, by striking the word “flexibility” and renumber subrule 7.6(3) as subrule 7.6(2).

ITEM 4. Add **new** rule 545—7.10(17A) as follows:

**545—7.10(17A) Exemptions from public rule-making procedures.**

**7.10(2) Categories exempt.** In lieu of the words “(List here narrowly drawn classes of rules where such an exemption is justified and a brief statement of the reasons for exempting each of them)”, insert the following:

“a. Rules which are mandated by federal law or regulation in any situation where the department has no option but to adopt specified rules or where federal funding is contingent upon the adoption of the rules;

“b. Rules which implement recent legislation when a statute provides for an effective date which does not allow for the usual notice and public participation requirements;

“c. Rules which confer a benefit or remove a restriction on the public or some segment of the public;

“d. Rules which are necessary because of imminent peril to the public health, safety or welfare; and

“e. Nonsubstantive rules intended to correct typographical errors, incorrect citations, or other errors in existing rules.”

ITEM 5. Amend **545—Chapter 7**, implementation clause, as follows:

These rules are intended to implement Iowa Code section ~~8.6~~ and chapter 17A as amended by 1998 Iowa Acts, chapter 1202, and Iowa Code section 25B.6.

**ARC 8808A****CIVIL RIGHTS COMMISSION[161]****Notice of Intended Action**

Twenty-five interested persons, a governmental subdivision, an agency or association of 25 or more persons may demand an oral presentation hereon as provided in Iowa Code section 17A.4(1)<sup>b</sup>.

Notice is also given to the public that the Administrative Rules Review Committee may, on its own motion or on written request by any individual or group, review this proposed action under section 17A.8(6) at a regular or special meeting where the public or interested persons may be heard.

Pursuant to the authority of Iowa Code section 216.5(10), the Civil Rights Commission proposes to amend Chapter 1, “Rules of Practice,” and Chapter 4, “Contested Cases,” Iowa Administrative Code.

These amendments are intended to update the manner in which rule making, declaratory orders, and contested cases are handled. The amendments for rule making and declaratory orders adopt the language of the uniform rules with the addition of a petition form for rule making and an appeal of a declaratory order to the commission that does not appear in the uniform rules. The rules for contested cases were adopted from a combination of the uniform rules, Iowa Rules of Civil Procedure, and analysis of the Commission’s current rules for contested cases.

Any interested person may make written suggestions or comments on the proposed amendments on or before April 13, 1999. Such written suggestions or comments should be directed to the Civil Rights Commission, 211 East Maple, 2nd Floor, Des Moines, Iowa 50309, fax (515)242-5840.

Persons are also invited to present oral or written comments at a public hearing which will be held on April 13, 1999, at 1 p.m. in the Conference Room at the Civil Rights Commission, 211 East Maple, 2nd Floor, Des Moines, Iowa 50309. At the hearing, persons will be asked to give their names and addresses for the record and to confine their remarks to the subject of the proposed amendments.

Any persons who intend to attend the public hearing and have special requirements such as hearing or mobility im-

CIVIL RIGHTS COMMISSION[161](cont'd)

pairments should contact the Civil Rights Commission and advise of specific needs.

These amendments are intended to implement Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202.

The following amendments are proposed.

ITEM 1. Rescind rule 161—1.2(216) and adopt the following new rule in lieu thereof:

**161—1.2(216) Commission procedure for rule making.**

**1.2(1) Initiation of rule-making procedures.**

a. Any person or state agency may file a petition for rule making with the commission at its location as defined in 161—paragraph 1.1(1)“b.” A petition is deemed filed when it is received by that office. The commission shall provide the petitioner with a file-stamped copy of the petition if the petitioner provides the commission an extra copy for this purpose. The petition must be typewritten or legibly handwritten in ink and must substantially conform to the following form:

**BEFORE THE IOWA CIVIL RIGHTS COMMISSION**

Petition by (Name of Petitioner) for the (adoption, amendment, or repeal) of rules relating to (state subject matter).	}	<b>PETITION FOR RULE MAKING</b>
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The petition must provide the following information:

1. A statement of the specific rule-making action sought by the petitioner including the text or a summary of the contents of the proposed rule or amendment to a rule, a citation and the relevant language to the particular portion or portions of the rule proposed to be amended or repealed.

2. A citation to any law deemed relevant to the commission's authority to take the action urged or to the desirability of that action.

3. A brief summary of petitioner's arguments in support of the action urged in the petition.

4. A brief summary of any data supporting the action urged in the petition.

5. The names and addresses of other persons, or a description of any class of persons, known by petitioner to be affected by, or interested in, the proposed action which is the subject of the petition.

b. The commission shall act upon the request within 60 days after its submission in accordance with Iowa Code section 17A.7 as amended by 1998 Iowa Acts, chapter 1202.

c. The commission may initiate rule-making procedures upon its own motion in accordance with Iowa Code section 17A.4.

**1.2(2) Advice on possible rules before notice of proposed rule adoption.** In addition to seeking information by other methods, the commission may, before publication of a Notice of Intended Action under Iowa Code section 17A.4(1)“a,” solicit comments from the public on a subject matter of possible rule making by the commission by causing notice to be published in the Iowa Administrative Bulletin of the subject matter and indicating where, when, and how persons may comment.

**1.2(3) Notice of proposed rule making—contents.** At least 35 days before the adoption of a rule, the commission shall cause Notice of Intended Action to be published in the Iowa Administrative Bulletin. The Notice of Intended Action shall include:

- a. A brief explanation of the purpose of the proposed rule;
- b. The specific legal authority for the proposed rule;
- c. Except to the extent impracticable, the text of the proposed rule;
- d. Where, when, and how persons may present their views on the proposed rule; and
- e. Where, when, and how persons may demand an oral proceeding on the proposed rule if the notice does not already provide for one.

Where inclusion of the complete text of a proposed rule in the Notice of Intended Action is impracticable, the commission shall include in the notice a statement fully describing the specific subject matter of the omitted portion of the text of the proposed rule, the specific issues to be addressed by that omitted text of the proposed rule, and the range of possible choices being considered by the agency for the resolution of each of those issues.

**1.2(4) Public participation.**

a. Written comments. For at least 20 days after publication of the Notice of Intended Action, persons may submit argument, data, and views, in writing on the proposed rule. Such written submissions should identify the proposed rule to which they relate and should be submitted to the commission at its location as defined in 161—paragraph 1.1(1)“b,” or the person designated in the Notice of Intended Action.

b. Oral proceedings. The commission may, at any time, schedule an oral proceeding on a proposed rule. The commission shall schedule an oral proceeding on a proposed rule if, within 20 days after a published Notice of Intended Action, a written request for an opportunity to make oral presentations is submitted to the commission by the administrative rule review committee, a governmental subdivision, an agency, an association having not less than 25 members, or at least 25 persons. That request must also contain the following additional information:

(1) A request by one or more individual persons must be signed by each of them and include the address and telephone number of each of them.

(2) A request by an association must be signed by an officer or designee of the association and must contain a statement that the association has at least 25 members and the address and telephone number of the person signing the request.

(3) A request by an agency or governmental subdivision must be signed by an official having authority to act on behalf of the entity and must contain the address and telephone number of the person signing the request.

c. Conduct of oral proceedings.

(1) Applicability. This paragraph applies only to those oral rule-making proceedings in which an opportunity to make oral presentations is authorized or required by Iowa Code section 17A.4(1)“b” as amended by 1998 Iowa Acts, chapter 1202, or subrule 1.2(5)“f.”

(2) Scheduling and notice. An oral proceeding on a proposed rule may be held in one or more locations and shall not be held earlier than 20 days after notice of its location and time is published in the Iowa Administrative Bulletin. That notice shall also identify the proposed rule by ARC number and citation to the Iowa Administrative Bulletin.

(3) Presiding officer. The commission, a member of the commission, or another person designated by the commission who will be familiar with the substance of the proposed rule, shall preside at the oral proceeding on a proposed rule. If the commission does not preside, the presiding officer shall prepare a memorandum for consideration by the com-

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mission summarizing the contents of the presentations made at the oral proceeding unless the commission determines that such a memorandum is unnecessary because the commission will personally listen to or read the entire transcript of the oral proceeding.

(4) Conduct of the proceeding. At an oral proceeding on a proposed rule persons may make oral statements and make documentary and physical submissions, which may include data, views, comments or arguments concerning the proposed rule. Persons wishing to make oral presentations at such a proceeding are encouraged to notify the commission at least one business day prior to the proceeding and indicate the general subject of their presentations. At the proceeding, those who participate shall indicate their names and addresses, identify any persons or organizations they may represent, and provide any other information relating to their participation deemed appropriate by the presiding officer. Oral proceedings shall be open to the public and shall be recorded by stenographic or electronic means.

1. At the beginning of the oral proceeding the presiding officer shall give a brief synopsis of the proposed rule, a statement of the statutory authority for the proposed rule, and the reasons for the commission decision to propose the rule. The presiding officer may place time limitations on individual oral presentations when necessary to ensure the orderly and expeditious conduct of the oral proceeding. To encourage joint oral presentations and to avoid repetition, additional time may be provided for persons whose presentations represent the views of other individuals as well as their own views.

2. Persons making oral presentations are encouraged to avoid restating matters which have already been submitted in writing.

3. To facilitate the exchange of information the presiding officer may, where time permits, open the floor to questions or general discussion.

4. The presiding officer shall have the authority to take any reasonable action necessary for the orderly conduct of the meeting.

5. Physical and documentary submissions presented by participants in the oral proceeding shall be submitted to the presiding officer. Such submissions become the property of the commission.

6. The oral proceeding may be continued by the presiding officer to a later time without notice other than by announcement at the hearing.

7. Participants in an oral proceeding shall not be required to take an oath or to submit to cross-examination. However, the presiding officer in an oral proceeding may question participants and permit the questions of participants about any matter relating to that rule-making proceeding, including any prior written submissions made by those participants in that proceeding; but no participant shall be required to answer any question.

8. The presiding officer in an oral proceeding may permit rebuttal statements and request the filing of written statements subsequent to adjournment of the oral presentations.

d. Additional information. In addition to receiving written comments and oral presentations on a proposed rule according to the provisions of this rule, the commission may obtain information concerning a proposed rule through any other lawful means deemed appropriate under the circumstances.

e. Accessibility. The commission shall schedule oral proceedings in rooms accessible to and functional for persons with physical disabilities. Person who have special re-

quirements should contact the commission at its location as defined in 161—paragraph 1.1(1)“b” in advance to arrange access or other needed services.

**1.2(5) Regulatory analysis.**

a. Definition of small business. A “small business” is defined in 1998 Iowa Acts, chapter 1202, section 10.

b. Qualified requesters for regulatory analysis—economic impact. The commission shall issue a regulatory analysis of a proposed rule that conforms to the requirements of Iowa Code section 17A.4(2a) after a proper request from:

- (1) The administrative rules coordinator;
- (2) The administrative rules review committee.

c. Qualified requesters for regulatory analysis—business impact. The commission shall issue a regulatory analysis of a proposed rule that conforms to the requirements of 1998 Iowa Acts, chapter 1202, section 10(2b) after a proper request from:

- (1) The administrative rules review committee,
- (2) The administrative rules coordinator,
- (3) At least 25 or more persons who sign the request provided that each represents a different small business,
- (4) An organization representing at least 25 small businesses. That organization shall list the name, address and phone number of not less than 25 small businesses it represents.

d. Time period for analysis. Upon receipt of a timely request for a regulatory analysis the commission shall adhere to the time lines described in 1998 Iowa Acts, chapter 1202, section 10(4).

e. Contents for request. A request for a regulatory analysis is made when it is mailed or delivered to the commission. The request shall be in writing and satisfy the requirements of 1998 Iowa Acts, chapter 1202, section 10(1).

f. Contents of concise summary. The contents of the concise summary shall conform to the requirements of 1998 Iowa Acts, chapter 1202, section 10(4,5).

g. Publication of a concise summary. The commission shall make available to the maximum extent feasible, copies of the published summary in conformance with the 1998 Iowa Acts, chapter 1202, section 10(5).

h. Regulatory analysis contents—rules review committee or rules coordinator. When a regulatory analysis is issued in response to written request from the administrative rules review committee or the administrative rules coordinator, the regulatory analysis shall conform to the requirements of 1998 Iowa Acts, chapter 1202, section 10(2a), unless a written request expressly waives one or more of the items listed in the section.

i. Regulatory analysis contents—substantial impact on small business. When a regulatory analysis is issued in response to a written request from the administrative rules review committee, the administrative rule coordinator, at least 25 persons signing that request who each qualify as a small business or by an organization representing at least 25 small businesses, the regulatory analysis shall conform to the requirements of 1998 Iowa Acts, chapter 1202, section 10(2b).

**1.2(6) Fiscal impact statement.**

a. A proposed rule that mandates additional combined expenditures exceeding \$100,000 by all affected political subdivisions, or agencies or entities which contract with the political subdivisions to provide service must be accompanied by a fiscal impact statement outlining the costs associated with the rule. A fiscal impact statement must satisfy the requirements of Iowa Code section 25B.6.

b. If the commission determines at the time it adopts a rule that a fiscal impact statement upon which the rule is

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based contains errors, the commission shall, at the same time, issue a corrected fiscal impact statement and publish the corrected fiscal impact statement in the Iowa Administrative Bulletin.

**1.2(7) Time and manner of rule adoption.**

a. Time of adoption. The commission shall not adopt a rule until the period for making written submissions and oral presentations has expired. Within 180 days after the later of the publication of the Notice of Intended Action, or the end of oral proceedings thereon, the commission shall adopt a rule pursuant to the rule-making proceeding or terminate the proceeding by publication of a notice to that effect in the Iowa Administrative Bulletin.

b. Consideration of public comment. Before the adoption of a rule, the commission shall consider fully all of the written submissions and oral submissions received in that rule-making proceeding or any memorandum summarizing such oral submissions, and any regulatory analysis or fiscal impact statement issued in that rule-making proceeding.

c. Reliance on commission expertise. Except as otherwise provided by law, the commission may use its own experience, technical competence, specialized knowledge, and judgment in the adoption of a rule.

**1.2(8) Variance between adopted rule and published notice of proposed rule adoption.**

a. The commission shall not adopt a rule that differs from the rule proposed in the Notice of Intended Action on which the rule is based unless:

(1) The differences are within the scope of the subject matter announced in the Notice of Intended Action and are in character with the issues raised in that notice; and

(2) The differences are a logical outgrowth of the contents of that Notice of Intended Action and the comments submitted in response thereto; and

(3) The Notice of Intended Action provided fair warning that the outcome of that rule-making proceeding could be the rule in question.

b. In determining whether the Notice of Intended Action provided fair warning that the outcome of that rule-making proceeding could be the rule in question the commission shall consider the following factors:

(1) The extent to which persons who will be affected by the rule should have understood that the rule-making proceeding on which it is based could affect their interests;

(2) The extent to which the subject matter of the rule or the issues determined by the rule are different from the subject matter or issues contained in the Notice of Intended Action; and

(3) The extent to which the effects of the rule differ from the effects of the proposed rule contained in the Notice of Intended Action.

c. The commission shall commence a rule-making proceeding within 60 days of receipt of a petition for rule making seeking the amendment or repeal of a rule that differs from the proposed rule contained in the Notice of Intended Action upon which the rule is based, unless the commission finds that the differences between the adopted rule and the proposed rule are so insubstantial as to make such a rule-making proceeding wholly unnecessary. A copy of any such finding and the petition to which it responds shall be sent to petitioner, the administrative rules coordinator, and the administrative rules review committee, within 3 days of its issuance.

d. Concurrent rule-making proceedings. Nothing in this rule disturbs the discretion of the commission to initiate, concurrently, several different rule-making proceedings on

the same subject with several different published Notices of Intended Action.

**1.2(9) Concise statement of reasons.**

a. General. When requested by a person, either prior to the adoption of a rule or within 30 days after its publication in the Iowa Administrative Bulletin as an adopted rule, the commission shall issue a concise statement of reasons for the rule. Requests for such a statement must be in writing and be delivered to the commission's office as defined in 161—paragraph 1.1(1)“b.” The request should indicate whether the statement is sought for all or only a specified part of the rule. Requests will be considered made on the date received.

b. Contents. The concise statement of reasons shall contain:

(1) The reasons for adopting the rule;

(2) An indication of any change between the text of the proposed rule contained in the published Notice of Intended Action and the text of the rule as finally adopted, with the reasons for any such change;

(3) The principal reasons urged in the rule-making proceeding for and against the rule, and the commission's reasons for overruling the arguments made against the rule.

c. Time of issuance. After a proper request, the commission shall issue a concise statement of reasons by the later of the time the rule is adopted or 35 days after receipt of the request.

**1.2(10) Contents, style, and form of rule.**

a. Contents. Each adopted rule by the commission shall contain the text of the rule and, in addition:

(1) The date the commission adopted the rule;

(2) A brief explanation of the principal reasons for the rule-making action if such reasons are required by Iowa Code section 17A.4(1)“b” as amended by 1998 Iowa Acts, chapter 1202, or the commission in its discretion decides to include such reasons;

(3) A reference to all rules repealed, amended, or suspended by the rule;

(4) A reference to the specific statutory or other authority authorizing adoption of the rule;

(5) Any findings required by any provision of law as a prerequisite to adoption or effectiveness of the rule;

(6) A brief explanation of the principal reasons for the failure to provide for waivers to the rule if no waiver provision is included and a brief explanation of any waiver or special exceptions provided in the rule if such reasons are required by Iowa Code section 17A.4(1)“b” as amended by 1998 Iowa Acts, chapter 1202, or the commission in its discretion decides to include such reasons; and

(7) The effective date of the rule.

b. References to materials not published in full. When the administrative code editor decides to omit the full text of a proposed or adopted rule because publication of the full text would be unduly cumbersome, expensive, or otherwise inexpedient, the commission shall prepare and submit to the administrative code editor for inclusion in the Iowa Administrative Bulletin and Iowa Administrative Code a summary statement describing the specific subject matter of the omitted material. This summary statement shall include the title and a brief description sufficient to inform the public of the specific nature and subject matter of the proposed or adopted rules, and of significant issues involved in these rules. The summary statement shall also describe how a copy of the full text of the proposed or adopted rule, including any unpublished matter, may be obtained from the commission. The commission will provide a copy of that full text at actual cost upon request and shall make copies of the full

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text available for review at the state law library and may make the standards available electronically.

At the request of the administrative code editor, the commission shall provide a proposed statement explaining why publication of the full text would be unduly cumbersome, expensive, or otherwise inexpedient.

c. Style and form. In preparing its rules, the commission shall follow the uniform numbering system, form, and style prescribed by the administrative rules coordinator.

1.2(11) Filing of rules. The commission shall file each rule it adopts in the office of the administrative rules coordinator. The filing must be executed as soon after adoption of the rule as is practicable. At the time of filing, each rule must have attached to it any fiscal impact statement and any concise statement of reasons that was issued with respect to that rule. If a fiscal impact statement or statement of reasons for that rule was not issued until a time subsequent to the filing of that rule, the note or statement must be attached to the filed rule within five working days after the note or statement is issued. In filing a rule, the agency shall use the standard form prescribed by the administrative rules coordinator.

1.2(12) Effectiveness of rules prior to publication.

a. Grounds. The commission may make a rule effective after its filing at any stated time prior to 35 days after its indexing and publication in the Iowa Administrative Bulletin if it finds that a statute so provides, the rule confers a benefit or removes a restriction on some segment of the public, or that the effective date of the rule is necessary to avoid imminent peril to the public health, safety, or welfare. The commission shall incorporate the required finding and a brief statement of its supporting reasons in each rule adopted in reliance upon this subrule.

b. Special notice. When the commission makes a rule effective prior to its indexing and publication in reliance upon the provisions of Iowa Code section 17A.5(2)"b"(3), the commission shall employ all reasonable efforts to make its contents known to the persons who may be affected by that rule prior to the rule's indexing and publication. The term, "all reasonable efforts" requires the commission to employ the most effective and prompt means of notice rationally calculated to inform potentially affected parties of the effectiveness of the rule that is justified and practical under the circumstances considering the various alternatives available for this purpose, the comparative costs to the commission of utilizing each of those alternatives, and the harm suffered by affected persons from any lack of notice concerning the contents of the rule prior to its indexing and publication. The means that may be used for providing notice of such rules prior to their indexing and publication include, but are not limited to, any one or more of the following means: radio, newspaper, television, signs, mail, telephone, or personal notice or electronic means.

A rule made effective prior to its indexing and publication in reliance upon the provisions of Iowa Code section 17A.5(2)"b"(3), shall include in that rule a statement describing the reasonable efforts that will be used to comply with the requirements of 1.2(12)"b."

1.2(13) Review by commission of rules.

a. Any interested person, association, agency, or political subdivision may submit a written request to the administrative rules coordinator requesting the commission to conduct a formal review of a specified rule. Upon approval of that request by the administrative rules coordinator, the commission shall conduct a formal review of a specified rule to determine whether a new rule should be adopted instead or the rule should be amended or repealed. The commission

may refuse to conduct a review if it has conducted such a review of the specified rule within five years prior to the filing of the written request.

b. In conducting the formal review, the commission shall prepare within a reasonable time a written report summarizing its findings, its supporting reasons, and any proposed course of action. The report must include a concise statement of the commission's findings regarding the rule's effectiveness in achieving its objectives, including a summary of any available supporting data. The report shall also concisely describe significant written criticisms of the rule received during the previous five years, including a summary of any petitions for waiver of the rule received by the commission or granted by the commission. The report shall describe alternative solutions to resolve the criticisms of the rule, the reasons any were rejected, and any changes made in the rule in response to the criticisms as well as the reasons for the changes. A copy of the commission's report shall be sent to the administrative rules review committee.

ITEM 2. Rescind rule 161—1.4(216) and adopt the following **new** rule in lieu thereof:

**161—1.4(216) Procedure for obtaining declaratory orders.**

1.4(1) Petition for declaratory order. Any person may file a petition with the commission for a declaratory order as to the applicability to specified circumstances of a statute, rule, or order within the primary jurisdiction of the commission, at its location as defined in 161—paragraph 1.1(1)"b." A petition is deemed filed when it is received by that office. The commission shall provide the petitioner with a file-stamped copy of the petition if the petitioner provides the commission an extra copy for this purpose. The petition must be typewritten or legibly handwritten in ink and must substantially conform to the following form:

IOWA CIVIL RIGHTS COMMISSION

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Petition by (Name of Petitioner) for a Declaratory Order on (Cite provisions of law involved).	}	PETITION FOR DECLARATORY ORDER
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The petition must provide the following information:

1. A clear and concise statement of all relevant facts on which the order is requested.
2. A citation and the relevant language of the specific statutes, rules, policies, decisions, or orders, whose applicability is questioned, and any other relevant law.
3. The questions petitioner wants answered, stated clearly and concisely.
4. The answers to questions desired by the petitioner and a summary of the reasons urged by the petitioner in support of those answers.
5. The reasons for requesting the declaratory order and disclosure of the petitioner's interest in the outcome.
6. A statement indicating whether the petitioner is currently a party to another proceeding involving the questions at issue and whether, to the petitioner's knowledge, those questions have been decided by, are pending determination by, or are under investigation by, any governmental entity.
7. The names and addresses of other persons, or a description of any class of person, known by petitioner to be affected by, or interested in, the questions presented in the petition.

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8. Any request by petitioner for a meeting provided by 1.4(7).

The petition must be dated and signed by the petitioner or the petitioner's representative. It must also include the name, mailing address, and telephone number of the petitioner and petitioner's representative, and a statement indicating the person to whom communications concerning the petition should be directed.

1.4(2) Notice of petition. Within 15 days after receipt of a petition for a declaratory order, the commission shall give notice of the petition to all persons not served by the petitioner pursuant to 1.4(6) to whom notice is required by any provision of law. The commission may also give notice to other persons.

1.4(3) Intervention.

a. Persons who qualify under any applicable provision of law as an intervenor and who file a petition for intervention within 30 days of the filing of a petition for declaratory order shall be allowed to intervene in a proceeding for a declaratory order.

b. Any person who files a petition for intervention at any time prior to the issuance of an order may be allowed to intervene in a proceeding for a declaratory order at the discretion of the commission.

c. A petition for intervention shall be filed at the commission office. Such a petition is deemed filed when it is received by that office. The commission will provide the petitioner with a file-stamped copy of the petition for intervention if the petitioner provides an extra copy for this purpose. A petition for intervention must be typewritten or legibly handwritten in ink and must substantially conform to the following form:

IOWA CIVIL RIGHTS COMMISSION

Petition by (Name of Original Petitioner) for a Declaratory Order on (Cite provisions of law cited in original petition).	}	PETITION FOR INTERVENTION
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The petition for intervention must provide the following information:

- (1) Facts supporting the intervenor's standing and qualifications for intervention.
- (2) The answers urged by the intervenor to the question or questions presented and a summary of the reasons urged in support of those answers.
- (3) Reasons for requesting intervention and disclosure of the intervenor's interest in the outcome.
- (4) A statement indicating whether the intervenor is currently a party to any proceeding involving the questions at issue and whether, to the intervenor's knowledge, those questions have been decided by, are pending determination by, or are under investigation by, any governmental entity.
- (5) The names and addresses of any additional persons, or a description of any additional class of persons known by the intervenor to be affected by, or interested in, the questions presented.
- (6) Whether the intervenor consents to be bound by the determination of the matters presented in the declaratory order proceeding.

The petition must be dated and signed by the intervenor or the intervenor's representative. It must also include the name, mailing address, and telephone number of the interve-

nor and intervenor's representative, and a statement indicating the person to whom communications should be directed.

1.4(4) Briefs. The petitioner or any intervenor may file a brief in support of the position urged. The commission may request a brief from the petitioner, any intervenor, or from any other person concerning the question raised.

1.4(5) Inquiries. Inquiries concerning the status of a declaratory order proceeding may be made to the executive director at the commission's office.

1.4(6) Service and filing of petitions and other papers.

a. When service required. Except where otherwise provided by law, every petition for declaratory order, petition for intervention, brief, or other paper filed in a proceeding for a declaratory order shall be served upon each of the parties of record to the proceeding, and on all other persons identified in the petition for declaratory order or petition for intervention as affected by or interested in the questions presented, simultaneously with their filing. The party filing a document is responsible for service on all parties and other affected or interested persons.

b. Filing—when required. All petitions for declaratory orders, petitions for intervention, briefs, or other papers in a proceeding for a declaratory order shall be filed with the commission at its location as defined in 161—paragraph 1.1(1)“b.” All petitions, briefs, or other papers that are required to be served upon a party shall be filed simultaneously with the Iowa civil rights commission.

c. Method of service, time of filing, and proof of mailing. Method of service shall be by regular mail. Time of filing and proof of mailing shall be as provided by 161—subrule 3.5(8).

1.4(7) Consideration. Upon request by petitioner, the commission must schedule a brief and informal meeting between the original petitioner, all intervenors, and the commission, a member of the commission, or a member of the staff of the commission, to discuss the questions raised. The commission may solicit comments from any person on the questions raised. Also, comments on the questions raised may be submitted to the commission by any person.

1.4(8) Action on petition.

a. Within the time allowed by 1998 Iowa Acts, chapter 1202, section 13(5) after receipt of a petition for a declaratory order, the executive director or designee shall take action on the petition as required by 1998 Iowa Acts, chapter 1202, section 13(5).

b. The date of issuance of an order or of a refusal to issue an order is as defined in (contested case uniform rules X.2).

c. Within 20 days of the issuance of a declaratory order, the petitioner or intervenors may appeal that order to the commissioners. The commissioners will consider the appeal at a subsequent commissioners' meeting and will either affirm, overturn, or remand the order.

1.4(9) Refusal to issue order.

a. The commission shall not issue a declaratory order where prohibited by 1998 Iowa Acts, chapter 1202, section 13(1), and may refuse to issue a declaratory order on some or all questions raised for the following reasons:

- (1) The petition does not substantially comply with the required form.
- (2) The petition does not contain facts sufficient to demonstrate that the petitioner will be aggrieved or adversely affected by the failure of the commission to issue an order.
- (3) The commission does not have jurisdiction over the questions presented in the petition.
- (4) The questions presented by the petition are also presented in a current rule making, contested case, or other

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agency or judicial proceeding, that may definitively resolve them.

(5) The questions presented by the petition would more properly be resolved in a different type of proceeding or by another body with jurisdiction over the matter.

(6) The facts or questions presented in the petition are unclear, overbroad, insufficient, or otherwise inappropriate as a basis upon which to issue an order.

(7) There is no need to issue an order because the questions raised in the petition have been settled due to a change in circumstances.

(8) The petition is not based upon facts calculated to aid in the planning of future conduct but is, instead, based solely upon prior conduct in an effort to establish the effect of that conduct or to challenge an agency decision already made.

(9) The petition requests a declaratory order that would necessarily determine the legal rights, duties, or responsibilities of other persons who have not joined in the petition, intervened separately, or filed a similar petition and whose position on the questions presented may fairly be presumed to be adverse to that of petitioner.

(10) The petitioner requests the commission to determine whether a statute is unconstitutional on its face.

b. A refusal to issue a declaratory order must indicate the specific grounds for the refusal and constitutes final agency action on the petition.

c. Refusal to issue a declaratory order pursuant to this provision does not preclude the filing of a new petition that seeks to eliminate the grounds for the refusal to issue a ruling.

**1.4(10) Contents of declaratory order—effective date.** In addition to the ruling itself, a declaratory order must contain the date of its issuance, the name of petitioner and all intervenors, the specific statutes, rules, policies, decisions, or orders involved, the particular facts upon which it is based, and the reasons for its conclusion.

A declaratory order is effective on the date of issuance.

**1.4(11) Copies of orders.** A copy of all orders issued in response to a petition for a declaratory order shall be mailed promptly to the original petitioner and all intervenors.

**1.4(12) Effect of declaratory order.** A declaratory order has the same status and binding effect as a final order issued in a contested case proceeding. It is binding on the commission, the petitioner, and any intervenors who consent to be bound and is applicable only in circumstances where the relevant facts and the law involved are indistinguishable from those on which the order was based. As to all other persons, a declaratory ruling serves only as precedent and is not binding on the commission. The issuance of a declaratory order constitutes final agency action on the petition.

ITEM 3. Rescind rules **161—4.1(601A)** to **161—4.6(601A)**, renumber **161—4.7(601A)** and **161—4.8(601A)** as **161—4.32(601A)** and **161—4.33(601A)**, respectively, and adopt the following new rules:

**161—4.1(17A) General provisions.**

**4.1(1) Scope and applicability.** This chapter applies to contested case proceedings conducted by the Iowa civil rights commission.

**4.1(2) Prosecutory representative of commission.** The commission's case in support of the complaint shall be presented by the attorney or agent of the commission. An assistant attorney general may represent the Iowa civil rights commission at a contested case proceeding.

**4.1(3) Time.** Time shall be computed as provided in Iowa Code subsection 4.1(34).

**4.1(4) Modification of time limits.** For good cause shown, the presiding officer may extend or shorten the time to take any action, except as precluded by statute. Except for good cause stated in the record, before extending or shortening the time to take any action, the presiding officer shall afford all parties an opportunity to be heard or to file written arguments.

**4.1(5) Extension of time for service by mail.** Whenever a party has the right or is required by this chapter to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon that party and the notice or paper is served upon that party by mail, three days shall be added to the prescribed period. Such additional time shall not be applicable where the presiding officer has prescribed the method of service of notice and the number of days to be given. This rule has no effect on actions which must be taken within a prescribed period after the issuance of a proposed decision or final order.

**161—4.2(17A) Notice of hearing and answer.**

**4.2(1) Statement of charges.**

a. Where conciliation efforts fail and it is determined that the record justifies proceeding to hearing, the commission's attorney or the executive director shall prepare a written statement of charges in support of the complaint and forward it to the presiding officer together with a request for a hearing date.

b. The statement of charges shall contain:

(1) An allegation that the respondent is a proper respondent within the meaning of and subject to provisions of the Iowa civil rights Act.

(2) A factual allegation or allegations of an unfair or discriminatory practice or practices, substantially as uncovered in the investigation, stated in the complaint (including amendments thereto), stated in the order of probable cause, or stated in the investigative summary.

c. A statement of charges is sufficient if it:

(1) Names the respondents and complainants;

(2) States the section(s) of the statute alleged to be violated; and

(3) Incorporates by reference the complaint and any amendments to the complaint.

d. The statement of charges shall also specifically identify all allegations, if any, in the complaint, as amended, which:

(1) Have been closed by other than a probable cause finding, or

(2) The commission has elected not to prosecute despite a probable cause finding.

e. None of the allegations identified pursuant to rule 4.2(1)“d” shall be considered as a claim of discrimination in the contested case proceeding, but evidence on such allegations may be considered when relevant to other allegations of discrimination or as background evidence.

**4.2(2) Scheduling conference.**

a. The presiding officer may set the matter for a scheduling conference in order that the parties, including the commission, and the presiding officer may arrive at a mutually agreed date for the public hearing. If practicable the scheduling conference should be set for no sooner than 7 and no later than 30 days after the presiding officer receives the statement of charges. The parties may be notified by regular mail of the date of the scheduling conference. The scheduling conference may be conducted in whole or in part by telephone.

b. If no date can be agreed upon, the date of the public hearing may be set according to the presiding officer's discretion.

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c. A public hearing should be scheduled for as early a date as practicable. In setting the date of hearing the availability of the presiding officer, the parties, the attorneys involved, likely witnesses, and any special circumstances shall be considered.

d. In setting the place of hearing, the location of the presiding officer, the parties, the attorneys involved, likely witnesses, and any special circumstances shall be considered.

**4.2(3)** Notice of hearing. Delivery of the notice of hearing constitutes the commencement of the contested case proceeding. Delivery shall be executed by any of the following means: certified mail with return receipt requested, personal service as provided in the Iowa Rules of Civil Procedure, first-class mail, or publication as provided by the Iowa Rules of Civil Procedure to all interested parties or their attorneys at least 30 days before the date of the hearing. Certified mail return receipts, returns of service, or similar evidence of service shall be filed with the presiding officer. The notice shall include:

- a. The time and place of hearing;
- b. The nature of the hearing, the legal authority and jurisdiction under which the hearing is being held;
- c. A short and plain statement of the matters asserted. This requirement may be satisfied by a statement of the issues as described by the statement of charges or an incorporation of the attached statement of charges;
- d. The reference to the sections of the statute and rules involved;

e. Identification of all parties including the name, address and telephone number of the person who will act as advocate for the commission and of parties' counsel where known;

f. Reference to the procedural rules governing conduct of the contested case proceeding;

g. Identification of the presiding officer, if known.

**4.2(4)** Answer to notice of hearing. The respondent is encouraged to file an answer to the allegations contained within the notice of hearing within 20 days of the service of the notice of hearing. Answers are encouraged as a means of sharpening the issues and preserving claimed error.

a. If an answer is filed, it should show on whose behalf it is filed and specifically admit, deny, or otherwise answer all material allegations contained within the notice of hearing. The answer should also state any facts alleged to show an affirmative defense and contain as many additional defenses as the respondent may claim.

b. An answer should state the name, address and telephone number of the person filing the answer, the person or entity on whose behalf the answer is filed, and the attorney, if any, representing that person.

c. Failure to file an answer or failure to follow the guidelines of this rule does not by itself constitute a waiver of any argument nor an admission of any issue. The optional nature of the answer, however, does not affect the respondent's obligations to raise issues in a timely fashion, to reply to discovery, or to fulfill any other obligation which is imposed upon respondent by law.

**4.2(5) Presiding officer.**

a. The presiding officer assigned to render a proposed decision shall be an administrative law judge employed by the department of inspections and appeals.

b. As used in these rules the term "presiding officer" shall mean the administrative law judge employed by the department of inspections and appeals assigned to render a proposed decision in the contested case.

c. As used in rules 4.13(17A) and 4.14(17A) the term "presiding officer" shall include the commissioners of the Iowa civil rights commission as well as the administrative law judge assigned to render a proposed decision in the contested case.

**161—4.3(17A) Amendment.**

**4.3(1)** Any notice of hearing, petition, statement of charges, or other charging document may be amended before a responsive pleading has been filed. Amendments to pleadings after a responsive pleading has been filed and to an answer may be allowed with the consent of the other parties or in the discretion of the presiding officer who may impose terms or grant a continuance. Leave to amend, including leave to amend to conform to the proof, shall be freely given when justice so requires.

**4.3(2)** Amendment to conform to proof. When issues not raised by the notice of hearing or the answer are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings.

Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after the final decision; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the hearing on the ground that it is not within the issues made by the pleadings, the presiding officer may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be served thereby and the objecting party fails to satisfy the presiding officer that the admission of such evidence would prejudice that party in maintaining the action or defense upon the merits. The presiding officer may grant a continuance to enable the objecting party to meet such evidence.

**161—4.4(17A) Default.**

**4.4(1)** If a party fails to appear or participate in a contested case proceeding after proper service of notice, the presiding officer may, if no adjournment is granted, enter a default decision or proceed with the hearing and render a decision in the absence of the party.

**4.4(2)** Where appropriate and not contrary to law, any party may move for default against a party who has requested the contested case proceeding and has failed to file a required pleading or has failed to appear after proper service.

**4.4(3)** Default decisions or decisions rendered on the merits after a party has failed to appear or participate in a contested case proceeding become final agency action unless, within 15 days after the date of notification or mailing of the decision, a motion to vacate is filed and served on all parties or an appeal of a decision on the merits is timely initiated within the time provided by rule 4.23(17A). A motion to vacate must state all facts relied upon by the moving party which establish that good cause existed for that party's failure to appear or participate at the contested case proceeding. Each fact so stated must be substantiated by at least one sworn affidavit of a person with personal knowledge of each such fact, which affidavit(s) must be attached to the motion.

**4.4(4)** The time for further appeal of a decision for which a timely motion to vacate has been filed is stayed pending a decision on the motion to vacate.

**4.4(5)** Properly substantiated and timely filed motions to vacate shall be granted only for good cause shown. The burden of proof as to good cause is on the moving party. Adverse parties shall have ten days to respond to a motion to vacate. Adverse parties shall be allowed to conduct discovery as to the issue of good cause and to present evidence on the

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issue prior to a decision on the motion, if a request to do so is included in that party's response.

**4.4(6)** "Good cause" for purposes of this rule shall have the same meaning as "good cause" for setting aside a default judgment under Iowa Rule of Civil Procedure 236.

**4.4(7)** A decision denying a motion to vacate is subject to further appeal within the time limit allowed for further appeal of a decision on the merits in the contested case proceeding. A decision granting a motion to vacate is subject to interlocutory appeal by the adverse party pursuant to rule 4.25(17A).

**4.4(8)** If a motion to vacate is granted and no timely interlocutory appeal has been taken, the presiding officer shall issue another notice of hearing and the contested case shall proceed accordingly.

**4.4(9)** A default decision may award any relief consistent with the notice of hearing and the commission's remedial authority under the Iowa civil rights Act.

**4.4(10)** A default decision may provide either that the default decision is to be stayed pending a timely motion to vacate or that the default decision is to take effect immediately.

**161—4.5(17A) Consolidation and severance.**

**4.5(1)** Grounds for consolidation. The presiding officer may, upon motion, consolidate any or all matters at issue in two or more contested case proceedings where:

- a. The matters at issue involve common parties or common questions of fact or law;
- b. Consolidation would expedite and simplify consideration of the issues involved; and
- c. Consolidation would not adversely affect the rights of any of the parties to those proceedings.

**4.5(2)** Effect of consolidation. Where consolidated hearings are held, a single record of the proceedings may be made and the evidence introduced in one matter may be considered as introduced in the other, and a separate or joint decision shall be made at the discretion of the presiding officer.

**4.5(3)** Severance. The presiding officer may, for good cause shown, order any contested case proceedings or portions thereof severed.

**161—4.6(17A) Filing and service of documents.**

**4.6(1)** When service required. Except where otherwise provided by law, every pleading, motion, document, or other paper filed in a contested case proceeding and every other paper relating to discovery in such a proceeding shall be served upon each of the parties of record to the proceeding, including the person designated as advocate or prosecutor for the commission, simultaneously with their filing. Except for the original notice of hearing and an application for rehearing as provided in Iowa Code section 17A.16(2), the party filing a document is responsible for service on all parties.

**4.6(2)** Service—how made. Service upon a party represented by an attorney shall be made upon the attorney unless otherwise ordered. Service is made by delivering, mailing, or transmitting by fax (facsimile) a copy to the attorney or to the party at the attorney's or party's last-known address. Service by mail is complete upon mailing, except where otherwise specifically provided by statute, rule or order.

**4.6(3)** Filing—when required. After the notice of hearing, all pleadings, motions, documents or other papers shall be filed with the presiding officer at the following address: Civil Rights Administrative Law Judge (or the name of the presiding officer), Department of Inspections and Appeals, Lucas State Office Building, Des Moines, Iowa 50319. Except as provided by these rules, the Iowa Rules of Civil Pro-

cedure pertaining to discovery, or other law all pleadings, motions, documents or other papers that are required to be served upon a party shall be filed simultaneously with the presiding officer.

**4.6(4)** Filing—how and when made. In a contested case before the commission a document is filed by any of the methods described in 481—subrule 10.12(3). The date a document is deemed to be filed in a contested case before the commission is determined according to 481—subrule 10.12(3).

**4.6(5)** Proof of mailing.

a. In a contested case before the commission proof of mailing is made according to 481—subrule 10.12(4).

b. Conflict among proofs of mailing. The date of mailing is the date shown by the legible United States Postal Service postmark and, only in the absence of a legible postmark, the date of mailing is the date shown by the affidavit, certificate, or certification of mailing.

**161—4.7(17A) Discovery.**

**4.7(1)** Civil procedure rules govern discovery. Discovery procedures applicable in civil actions, as set forth in the Iowa Rules of Civil Procedure, are applicable in contested cases. Unless lengthened or shortened by these rules or by order of the presiding officer, time periods for compliance with discovery shall be as provided in the Iowa Rules of Civil Procedure.

**4.7(2)** Motions relating to discovery. Any motion relating to discovery shall allege that the moving party has made a good-faith attempt to resolve the discovery issues involved with the opposing party. Motions in regard to discovery shall be ruled upon by the presiding officer. Opposing parties shall be afforded the opportunity to respond within ten days of the filing of the motion unless the time is shortened as provided in subrule 4.7(1). The presiding officer may rule on the basis of the written motion and any response, or may order argument on the motion.

**4.7(3)** Use at hearing. Evidence obtained in discovery may be used in the contested case proceeding if that evidence would otherwise be admissible in that proceeding.

**4.7(4)** Sanctions available. The Iowa Rules of Civil Procedure govern what sanctions may be imposed by the presiding officer for the failure to comply with a discovery order, the failure to respond to discovery, or failing to otherwise comply with the rules of discovery.

**4.7(5)** Discovery on commission and complainant. When discovery of information from the complainant is sought, discovery should be made upon the complainant with a copy thereof provided to the commission's representative. When discovery of information from the commission is sought, discovery should be made upon the commission with a copy thereof provided to the complainant or the complainant's representative. Discovery of the commission's investigative file may be made pursuant to Iowa Code section 17A.13(2).

**4.7(6)** Discovery materials not filed. Unless otherwise ordered by the presiding officer, no deposition, notice of deposition, interrogatory, request for production of documents, request for admission, or response, document or thing produced, or objection thereto shall be filed. Any motion attacking the sufficiency of a response to a discovery request must have a copy of the request and response attached or the motion may be denied. This rule does not apply to depositions to perpetuate testimony.

**4.7(7)** Discovery conference. A discovery conference may be ordered, requested, and held in the same manner and upon the same terms as are provided for in Iowa Rule of Civil Procedure 124.2.

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**4.7(8)** Duplication of civil procedure rules. The duplication in these rules of provisions contained within the Iowa Rules of Civil Procedure relating to discovery does not imply that other portions of the civil procedure rules do not govern discovery in contested cases before the commission.

**161—4.8(17A) Subpoenas.****4.8(1)** Issuance of subpoenas.

a. A commission subpoena shall be issued to a party upon request. Such a request should be in writing, but oral requests may be honored by the presiding officer. The request shall include the name, address, and telephone number of the requesting party. The presiding officer may issue a subpoena, or a subpoena for the production of documentary evidence, signed but otherwise in blank to a party requesting it, who shall fill it in before service.

b. Parties are responsible for service of their own subpoenas and payment of witness fees and mileage expenses.

**4.8(2)** Motion to quash or modify. The presiding officer may quash or modify a subpoena for any lawful reason upon motion in accordance with the Iowa Rules of Civil Procedure. A motion to quash or modify a subpoena shall be set for argument promptly.

**161—4.9(17A) Motions.**

**4.9(1)** Form. No technical form for motions is required. However prehearing motions must be in writing, state the grounds for relief, and state the relief sought. Any motion for summary judgment shall comply with the Iowa Rules of Civil Procedure. Motions made during the hearing may be stated orally upon the record.

**4.9(2)** Response. Any party may file a written response to a motion within 14 days after the motion is served, unless the time period is extended or shortened by the rules of the commission or the presiding officer. The presiding officer may consider a failure to respond within the required time period in ruling on a motion.

**4.9(3)** Oral argument.

a. The presiding officer may schedule oral argument on any motion.

b. Oral arguments on motions shall be held in Des Moines or by telephone conference call, unless the presiding officer orders otherwise.

c. A record of arguments will be made at the discretion of the presiding officer. A record may be made by tape recording or by certified shorthand reporter.

d. The expense of transcribing a record of the oral argument or any part thereof shall be charged to the requesting party.

**4.9(4)** Motions regarding hearing.

a. Motions pertaining to the hearing, except motions for summary judgment, must be filed and served at least ten days prior to the date of hearing unless there is good cause for permitting later action or the time for such action is lengthened or shortened by rule of the agency or an order of the presiding officer.

b. Motions regarding sequestration of witnesses need not be made ten days prior to the hearing.

**4.9(5)** Motions for summary judgment. Motions for summary judgment shall comply with the requirements of Iowa Rule of Civil Procedure 237 and shall be subject to disposition according to the requirements of that rule to the extent such requirements are not inconsistent with the provisions of this rule or any other provision of law governing the procedure in contested cases.

Motions for summary judgment must be filed and served at least 45 days prior to the scheduled hearing date, or other

time period determined by the presiding officer. Any party resisting the motion shall file and serve a resistance within 15 days, unless otherwise ordered by the presiding officer, from the date a copy of the motion was served. The time fixed for hearing or nonoral submission shall be not less than 20 days after the filing of the motion, unless a shorter time is ordered by the presiding officer. A summary judgment order rendered on all issues in a contested case is subject to rehearing pursuant to rule 4.30(17A) and appeal pursuant to rule 4.23(17A).

**161—4.10(17A) Prehearing conferences.**

**4.10(1)** Subject matter of conference. Upon the presiding officer's own motion or the motion of the parties, the presiding officer may direct the parties or their counsel to meet with the presiding officer for a conference to consider:

- a. Simplification of the issues;
- b. Necessity or desirability of amendments to pleadings for purposes of clarification, simplification, or limitation;
- c. Stipulations, admissions of fact and of contents and authenticity of documents;
- d. Limitation of number of witnesses;
- e. Scheduling dates for the exchange of witness lists and proposed exhibits;
- f. Identifying matters which the parties intend to request be officially noticed;
- g. Such other matters, including discovery matters, as may tend to expedite the disposition of the proceedings.

**4.10(2)** Prehearing conferences shall be conducted by telephone unless otherwise ordered. A record of the conference will be kept unless otherwise ordered by the presiding officer. A record of the conference may be by tape recording or by certified shorthand reporter. A party may request a copy of the tape recording or transcript of the conference, if it was recorded; or a transcript of the conference, if it was reported, and the requesting party will bear the cost of the recording or transcription.

**4.10(3)** Effect of conference. The record shall show the matters disposed of by order and by agreement in such pre-trial conferences. The subsequent course of the proceeding shall be controlled by such action.

**161—4.11(17A) Continuances.** Unless otherwise provided, applications for continuances shall be made to the presiding officer.

**4.11(1)** Written or oral motions for continuance. A written motion for a continuance shall:

- a. Be made at the earliest possible time and no less than seven days before the hearing except in case of unanticipated emergencies;
- b. State the specific reasons for the request; and
- c. Be signed by the requesting party or the party's representative.

An oral motion for a continuance may be made if the presiding officer waives the requirement for a written motion. However, a party making an oral motion for a continuance must confirm that request by written motion within five days after the oral request unless that requirement is waived by the presiding officer. No motion for continuance shall be made or granted without notice to all parties except in an emergency where notice is not feasible.

**4.11(2)** Factors to consider. In determining whether to grant a continuance, the presiding officer may consider:

- a. Prior continuances;
- b. The interests of all parties;
- c. The likelihood of informal settlement;
- d. The existence of an emergency;

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- e. Any objection;
- f. Any applicable time requirement;
- g. The existence of a conflict in the schedules of counsel, parties, and witnesses;
- h. The timeliness of the request; and
- i. Other relevant factors.

4.11(3) The presiding officer may require documentation of any grounds for continuance.

4.11(4) Failure of a party to timely obtain counsel, after clear and adequate notice of the right to be represented by an attorney, will not be considered grounds for a continuance in order to allow time to obtain counsel.

**161—4.12(17A) Telephone proceedings.** The presiding officer may resolve preliminary procedural motions by telephone conference in which all parties have an opportunity to participate. Other telephone proceedings may be held with the consent of all parties or by order of the presiding officer. The presiding officer will determine the location of the parties and witnesses for telephone hearings. The convenience of the witnesses or parties, as well as the nature of the case, will be considered when location is chosen.

**161—4.13(17A) Disqualification.**

4.13(1) A presiding officer or other person shall withdraw from participation in the making of any proposed or final decision in a contested case if that person:

- a. Has a personal bias or prejudice concerning a party or a representative of a party;
- b. Has personally investigated, prosecuted or advocated in connection with that case, the specific controversy underlying that case, another pending factually related contested case, or a pending factually related controversy that may culminate in a contested case involving the same parties;
- c. Is subject to the authority, direction or discretion of any person who has personally investigated, prosecuted or advocated in connection with that contested case, the specific controversy underlying that contested case, or a pending factually related contested case or controversy involving the same parties;
- d. Has acted as counsel to any person who is a private party to that proceeding within the past two years;
- e. Has a personal financial interest in the outcome of the case or any other significant personal interest that could be substantially affected by the outcome of the case;
- f. Has a spouse or relative within the third degree of relationship that: (1) is a party to the case, or an officer, director or trustee of a party; (2) is a lawyer in the case; (3) is known to have an interest that could be substantially affected by the outcome of the case; or (4) is likely to be a material witness in the case; or
- g. Has any other legally sufficient cause to withdraw from participation in the decision making in that case.

4.13(2) The term "personally investigated" means taking affirmative steps to interview witnesses directly or to obtain documents or other information directly. The term "personally investigated" does not include general direction and supervision of assigned investigators, unsolicited receipt of information which is relayed to assigned investigators, review of another person's investigative work product in the course of determining whether there is probable cause to initiate a proceeding, or exposure to factual information while performing other agency functions, including fact gathering for purposes other than investigation of the matter which culminates in a contested case. Factual information relevant to the merits of a contested case received by a person who later serves as presiding officer in that case shall be disclosed if

required by 1998 Iowa Acts, chapter 1202, section 19(3), and rules 4.13(3) and 4.14(8).

4.13(3) In a situation where a presiding officer or other person knows of information which might reasonably be deemed to be a basis for disqualification and decides voluntary withdrawal is unnecessary, that person shall submit the relevant information for the record by affidavit and shall provide for the record a statement of the reasons for the determination that withdrawal is unnecessary.

4.13(4) If a party asserts disqualification on any appropriate ground, including those listed in subrule 4.13(1), the party shall file a motion supported by an affidavit pursuant to 1998 Iowa Acts, chapter 1202, section 19(7). The motion must be filed as soon as practicable after the reason alleged in the motion becomes known to the party. If, during the course of the hearing, a party first becomes aware of evidence of bias or other grounds for disqualification, the party may move for disqualification but must establish the grounds by the introduction of evidence into the record.

If the presiding officer determines that disqualification is appropriate, the presiding officer shall withdraw. If the presiding officer determines that withdrawal is not required, the presiding officer shall enter an order to that effect. A party asserting disqualification may seek an interlocutory appeal under rule 4.25(17A).

4.13(5) Remittal of disqualification. A presiding officer disqualified by the terms of 4.13(1) "e" or "f" may, instead of withdrawing from the proceeding, disclose, either in writing or orally, on the record the basis of the disqualification. If, based on such disclosure, the parties and lawyers, independently of the administrative adjudicator's participation, all agree in writing that the adjudicator's relationship is immaterial or that the adjudicator's financial interest is insubstantial, the adjudicator is no longer disqualified, and may participate in the proceeding. The agreement, signed by all parties and lawyers, shall be incorporated in the record of the proceeding.

4.13(6) Partial disqualification of commission. The disqualification of one or more members of the commission who are considering adoption of a proposed decision of the presiding officer shall not prevent the remaining commissioners from considering the proposed decision.

**161—4.14(17A) Ex parte communication.**

4.14(1) Prohibited communications. Unless required for the disposition of ex parte matters specifically authorized by statute, following issuance of the notice of hearing, there shall be no communication, directly or indirectly, between the presiding officer and any party or representative of any party or any other person with a direct or indirect interest in such case in connection with any issue of fact or law in the case except upon notice and opportunity for all parties to participate. This does not prohibit persons jointly assigned to render a proposed or final decision or to make findings of fact or conclusions of law in the contested case from communicating with each other. Nothing in this provision is intended to preclude the presiding officer from communicating with members of the agency or seeking the advice or help of persons other than those with a personal interest in, or those engaged in personally investigating as defined in subrule 4.13(2), prosecuting, or advocating in, either the case under consideration or a pending factually related case involving the same parties as long as those persons do not directly or indirectly communicate to the presiding officer any ex parte communications they have received of a type that the presiding officer would be prohibited from receiving or

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that furnish, augment, diminish, or modify the evidence in the record.

**4.14(2)** Prohibitions on ex parte communications commence with the issuance of the notice of hearing in a contested case and continue for as long as the case is pending.

**4.14(3)** Written, oral or other forms of communication are "ex parte" if made without notice and opportunity for all parties to participate.

**4.14(4)** To avoid prohibited ex parte communications notice must be given in a manner reasonably calculated to give all parties a fair opportunity to participate. Notice of written communications shall be provided in compliance with rule 4.6(17A) and may be supplemented by telephone, facsimile, electronic mail or other means of notification. Where permitted, oral communications may be initiated through conference telephone call including all parties or their representatives.

**4.14(5)** Persons who jointly act as presiding officer in a pending contested case may communicate with each other without notice or opportunity for parties to participate.

**4.14(6)** Communications with the presiding officer involving uncontested scheduling or procedural matters do not require notice or opportunity for parties to participate. Parties should notify other parties prior to initiating such contact with the presiding officer when feasible, and shall notify other parties when seeking to continue hearings or other deadlines pursuant to rule 4.11(17A).

**4.14(7)** Disclosure of prohibited communications. A presiding officer who receives a prohibited ex parte communication during the pendency of a contested case must initially determine if the effect of the communication is so prejudicial that the presiding officer should be disqualified. If the presiding officer determines that disqualification is warranted, a copy of any prohibited written communication, all written responses to the communication, a written summary stating the substance of any prohibited oral or other communication not available in written form for disclosure, all responses made, and the identity of each person from whom the presiding officer received a prohibited ex parte communication shall be submitted for inclusion in the record under seal by protective order. If the presiding officer determines that disqualification is not warranted, such documents shall be submitted for inclusion in the record and served on all parties. Any party desiring to rebut the prohibited communication must be allowed the opportunity to do so upon written request filed within ten days after notice of the communication.

**4.14(8)** Promptly after being assigned to serve as presiding officer at any stage in a contested case proceeding, a presiding officer shall disclose to all parties material factual information received through ex parte communication prior to such assignment unless the factual information has already been or shortly will be disclosed pursuant to Iowa Code section 17A.13(2) or through discovery. Factual information contained in an investigative report or similar document need not be separately disclosed by the presiding officer as long as such documents have been or will shortly be provided to the parties.

**4.14(9)** The presiding officer may render a proposed or final decision imposing appropriate sanctions for violations of this rule including default, a decision against the offending party, censure, or suspension or revocation of the privilege to practice before the agency. Violation of ex parte communication prohibitions by agency personnel shall be reported to the executive director for possible sanctions inclu-

ding censure, suspension, dismissal, or other disciplinary action.

**161—4.15(17A) Powers of presiding officer.** The presiding officer who presides at the hearing shall have all powers necessary to the conduct of a fair and impartial hearing including, but not limited to the power to:

1. Conduct formal hearings in accordance with the provisions of this chapter;
2. Administer oaths and examine witnesses;
3. Compel the production of documents and appearance of witnesses in control of the parties;
4. Issue subpoenas;
5. Issue decisions and orders;
6. Rule on motions, and other procedural items or matters pending before the presiding officer;
7. Require the submission of briefs;
8. Issue such orders and rulings as will ensure the orderly conduct of the proceedings;
9. Receive, rule on, exclude or limit evidence and limit lines of questioning or testimony which are irrelevant, immaterial, or unduly repetitious;
10. Maintain the decorum of the hearing including the power to refuse to admit or to expel anyone whose conduct is disorderly;
11. Take any action authorized by these rules;
12. Impose appropriate sanctions against any party or person failing to obey an order under these rules which may include:

- Refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting the party from introducing designated matters in evidence;
- Excluding all testimony of an unresponsive or evasive witness, or determining that the answer of such witness, if given, would be unfavorable to the party, if any, having control over the witness; and
- Expelling any party or person from further participation in the hearing.

**161—4.16(17A) Hearing procedures.**

**4.16(1)** Objections. All objections shall be timely made and stated in the record. Any objection not duly made before the presiding officer shall be deemed waived.

**4.16(2)** Representation of parties. Parties have the right to participate or to be represented in all hearings or prehearing conferences related to their case. Partnerships, corporations, or associations may be represented by any member, officer, director or duly authorized agent. Any party may be represented by an attorney or another person authorized by law.

**4.16(3)** Rights of parties. Subject to terms and conditions prescribed by the presiding officer, parties have the right to introduce evidence on issues of material fact, cross-examine witnesses present at the hearing as necessary for a full and true disclosure of the facts, present evidence in rebuttal, and submit briefs and engage in oral argument.

**4.16(4)** Sequestration of witnesses. At the request of a party, a presiding officer may order witnesses sequestered so they cannot hear the testimony of other witnesses, and the judge may make the order sua sponte. This rule does not authorize sequestration of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of the cause.

**4.16(5)** The presiding officer shall conduct the hearing in the following manner:

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a. The presiding officer shall give an opening statement briefly describing the nature of the proceeding;

b. The parties shall be given an opportunity to present an opening statement;

c. Parties shall present their cases in the sequence determined by the presiding officer;

d. Each witness shall be sworn or affirmed by the presiding officer or the court reporter, and be subject to examination and cross-examination. The presiding officer may limit questioning in a manner consistent with law;

e. When all parties and witnesses have been heard, parties may be given the opportunity to present final arguments.

**4.16(6) Marking of exhibits.** Exhibits entered into evidence which are offered by the commission or the complainant shall be numbered serially, i.e., 1, 2, 3, etc.; whereas those offered by the respondent shall be lettered serially, i.e., A, B, C, ... AA, BB, etc.; and those offered jointly shall be designated by "joint exhibit" and numbered serially.

**4.16(7) Contents of record.** The record in a contested case before the presiding officer shall include:

a. All pleadings, motions, and rulings;

b. All evidence received or considered and all other submissions;

c. A statement of matters officially noticed;

d. All questions and offers of proof, objections, and rulings thereon;

e. All proposed findings and exceptions;

f. Any decision, opinion or report by the officer presiding at the hearing.

The term "all other submissions" as used in this rule includes, but is not limited to, all written arguments filed with the presiding officer or the commission plus any attachments to such arguments.

Deliberations of the commission when deciding whether to adopt a proposed decision are not part of the record unless expressly made part of the record by order of the commission or the presiding officer.

**4.16(8) Standards of conduct.**

a. All persons appearing in proceedings before the presiding officer are expected to act with integrity, and in an ethical manner.

b. The presiding officer may exclude from proceedings parties, witnesses, and their representatives for refusal to comply with directions, continued use of dilatory tactics, refusal to adhere to reasonable standards of orderly and ethical conduct, failure to act in good faith, or violation of the prohibition against ex parte communications. The presiding officer shall state in the record the cause for barring an attorney or other individual from participation in a particular proceeding. The presiding officer may suspend the proceeding for a reasonable time for the purpose of enabling a party to obtain another attorney or representative. In accordance with Rule 1.2 of the Committee on Professional Ethics and Conduct of the Iowa State Bar Association, the presiding officer may also file a complaint with the committee if the judge believes that there has been a violation by an attorney of the Iowa Code of Professional Responsibility for Lawyers.

c. An order barring an individual from participation in a proceeding should be made only in exceptional circumstances.

#### 161—4.17(17A) Evidence.

**4.17(1)** The presiding officer shall rule on admissibility of evidence and may, where appropriate, take official notice of facts in accordance with all applicable requirements of law.

**4.17(2)** Stipulation of facts is encouraged. The presiding officer may make a decision based on stipulated facts. Stipulated facts are binding on the presiding officer and the commission when it has not been proven that the stipulation was the result of fraud, wrongdoing, misrepresentation, or was not in accord with the intent of the parties.

**4.17(3)** Evidence in the proceeding shall be confined to the issues as to which the parties received notice prior to the hearing unless the parties waive their right to such notice by express or implied waiver, or the presiding officer determines that good cause justifies their expansion. If the presiding officer decides to admit evidence on issues outside the scope of notice over the objection of a party who did not have actual notice of those issues, that party, upon timely motion, shall receive a continuance sufficient to amend pleadings and to prepare on the additional issue. The scope of the issues at public hearing may include the facts as uncovered in the investigation and need not be limited to the allegations as stated in the original complaint.

**4.17(4)** The party seeking admission of an exhibit must provide opposing parties with an opportunity to examine the exhibit prior to the ruling on its admissibility. Copies of documents should normally be provided to opposing parties. All exhibits admitted into evidence shall be appropriately marked and be made part of the record.

**4.17(5)** Any party may object to specific evidence or may request limits on the scope of any examination or cross-examination. Such an objection shall be accompanied by a brief statement of the grounds upon which it is based. The objection, the ruling on the objection, and the reasons for the ruling shall be noted in the record. The presiding officer may rule on the objection at the time it is made or may reserve ruling until the written decision. Evidentiary objections, other than those based on relevancy, materiality, unduly repetitious evidence, privilege, discovery rules, or scope of examination, or any ground for which a ruling is compulsory as a matter of law, shall be simply noted in the record by the presiding officer.

**4.17(6)** Whenever evidence is ruled inadmissible, the party offering that exhibit may submit an offer of proof on the record. The party making the offer of proof for excluded oral testimony shall briefly summarize the testimony or, with permission of the presiding officer, present the testimony. If the excluded evidence consists of a document of exhibit, it shall be marked as part of an offer of proof and inserted in the record.

**4.17(7)** Although the rules of evidence do not apply in a contested case hearing, a finding shall be based upon the kind of evidence on which reasonably prudent persons are accustomed to rely for the conduct of their serious affairs, and may be based upon such evidence even if it would be inadmissible in a jury trial. Irrelevant, immaterial, or unduly repetitious evidence shall be excluded. The commission shall give effect to the rules of privilege recognized by law.

**4.17(8)** The authenticity of all documents submitted as proposed exhibits at the prehearing conference shall be deemed admitted unless objection is made at the prehearing conference or a written objection to authenticity of a document is filed at least ten days prior to the hearing. A party will be permitted to challenge authenticity at a later time upon a clear showing of good cause for failure to have made the objection earlier. A party's objection to authenticity is that party's refusal to admit the fact of authenticity and need not be ruled upon to be effective. If authenticity is not admitted under this rule it may be proved at hearing by any means permitted by law.

## CIVIL RIGHTS COMMISSION[161](cont'd)

**4.17(9)** No evidence shall be received at any hearing concerning offers or counter-offers of adjustment during efforts to conciliate or settle an alleged unfair or discriminatory practice.

**161—4.18(17A) Evidence of past sexual practices.**

**4.18(1)** Discovery regarding past sexual practices. In a contested case alleging conduct which constitutes sexual harassment, a party seeking discovery of information concerning the complainant's sexual conduct with persons other than the person who committed the alleged act of sexual harassment, must establish specific facts showing good cause for that discovery, and that the information sought is relevant to the subject matter of the action, and reasonably calculated to lead to the discovery of admissible evidence.

**4.18(2)** Evidence of past sexual practices inadmissible. In a contested case against a respondent which is accused of sexual harassment, or whose agent or employee is accused of sexual harassment, evidence concerning the past sexual behavior of the alleged victim is not admissible.

**161—4.19(17A) Cost of copies of record.** Upon request the commission shall provide a copy of the whole or any portion of the record at cost. The cost of preparing a copy of the record shall be paid by the requesting party.

**161—4.20(17A) Post-hearing briefs.**

**4.20(1)** In general. The presiding officer may fix times for submission of posthearing briefs. Unless otherwise ordered by the presiding officer, such briefs shall be filed simultaneously by all parties and there shall be no page limit nor any other formal requirements.

**4.20(2)** Reply briefs. If simultaneous briefs are filed then any party may file a reply brief within 10 days after service of the brief to which the reply is made.

**4.20(3)** Supplemental briefs. Posthearing briefs in addition to those ordered by the presiding officer under subrule 4.20(1) or those allowed by subrule 4.20(2) may be filed only upon application to the presiding officer.

**4.20(4)** Extensions. A motion for an extension of the time to file a brief shall be made no later than the day before the brief is due. A motion for an extension to file a brief may be oral and may be granted ex parte where the movant represents either (a) that the other parties who are filing briefs have been notified and that the motion is unopposed or (b) that there is an emergency which justifies such a request. An order granting an extension shall be in writing.

**4.20(5)** Late filing. Upon motion and within the discretion of the presiding officer a brief which is filed late may be struck.

**4.20(6)** Failure in a party's briefs to state, to argue, or to cite authority in support of an issue may be deemed waiver of that issue by that party before the presiding officer.

**161—4.21(17A) Requests to present additional evidence.**

**4.21(1)** In general. A party may request the taking of additional evidence only by establishing that the evidence is material, that good cause existed for failure to present the evidence at the hearing, and that the party has not waived the right to present the evidence.

**4.21(2)** After proposed decision issued. If a request to present additional evidence is made after the issuance of the proposed decision by the presiding officer then the request must be filed with the appeal or, by a nonappealing party, within 14 days after the service of the appeal. If the commission grants the motion to present additional evidence, the commission shall remand the case to the presiding officer for

the taking of the additional evidence and any appropriate modification of the proposed order.

**161—4.22(17A) Proposed decision.**

**4.22(1)** Written decision. After a review of the transcript, the evidence, and the briefs, the presiding officer shall set forth, in writing, findings of fact, conclusions of law, and a proposed decision and order. The proposed decision becomes the final decision of the commission without further proceedings unless there is an appeal to, or review on motion of, the Iowa civil rights commission within the time provided in rule 4.23(17A).

**4.22(2)** Notification. Upon receipt of the presiding officer's proposed decision, the commission shall forward a copy of the proposed decision to each of the parties by certified mail. A copy shall also be sent to counsel and to each commissioner.

**161—4.23(17A) Review of proposed decision on appeal to the commission.**

**4.23(1)** Appeal by party. Any adversely affected party may appeal a proposed decision to the commission within 30 days after issuance of the proposed decision.

**4.23(2)** Review. The commission may initiate review of a proposed decision on its own motion at any time within 60 days following the issuance of such a decision.

**4.23(3)** Notice of appeal. An appeal of a proposed decision is initiated by filing a timely notice of appeal with the Iowa civil rights commission. The notice of appeal must be signed by the appealing party or a representative of that party and contain a certificate of service. The notice shall specify:

- The parties initiating the appeal;
- The proposed decision or order appealed from;
- The specific findings or conclusions to which exception is taken and any other exceptions to the decision or order;
- The relief sought;
- The grounds for relief.

**4.23(4)** If an appeal or motion for review is filed, the executive director shall set a review date. The parties shall be notified of this date by certified mail. Copies of this notification shall also be sent to counsel and the commissioners.

**4.23(5)** An appeal is filed with the commission by delivering the notice of appeal to the commission at its offices in Des Moines. All appeals, and briefs shall be sent to the executive director of the Iowa civil rights commission in care of the commission at its Des Moines address. An appeal may be filed by any of the methods described in 161—subrules 3.5(1) to 3.5(4). Regardless of the method used to file an appeal, the date an appeal is filed is the date it is actually received by the commission in Des Moines.

**4.23(6)** Oral argument. All parties or their attorneys shall be allowed ten minutes to present oral argument to the commission whenever the commission reviews a proposed decision pursuant to this rule. The commission may, in its discretion, allow oral argument to continue longer.

**4.23(7)** Briefs and arguments. Unless otherwise ordered, within 20 days of the notice of appeal or order for review, each appealing party may file exceptions and briefs. Within 20 days thereafter, any party may file a responsive brief. Briefs shall cite any applicable legal authority and specify relevant portions of the record in that proceeding. The commission may shorten or extend the briefing period as appropriate. When filing a brief the party shall file an original and nine copies.

**161—4.24(17A) Scope of review by commission.**

**4.24(1)** In general. Whenever the commission reviews a proposed decision, it has all the power it would have in ini-

## CIVIL RIGHTS COMMISSION[161](cont'd)

tially making the final decision. The commission may adopt, modify or reject the presiding officer's proposed decision or it may remand the case to the presiding officer for the taking of additional evidence and the making of any further proposed findings of fact, conclusions of law, or decision and order the commission deems necessary.

**4.24(2) Limitation of issues.** Whenever the commission reviews a proposed decision it shall consider only those issues actually presented to the presiding officer unless the issue was one which either:

- a. Was raised prior to the proposed decision by a party, but not ruled upon, or
- b. Was discussed in the proposed decision, but not argued on brief by the parties.

This rule does not affect a party's right to seek disqualification of a commissioner under rule 4.13(17A) or 4.14(17A).

**161—4.25(17A) Interlocutory appeals.** Upon written request of a party or on its own motion, the commission may review an interlocutory order of the presiding officer. In determining whether to do so, the commission shall weigh the extent to which its granting the interlocutory appeal would expedite final resolution of the case and the extent to which review of that interlocutory order by the agency at the time it reviews the proposed decision of the presiding officer would provide an adequate remedy. Any request or motion for interlocutory review must be filed within seven days of issuance of the challenged order, but no later than the time for compliance with the order or the date of hearing, whichever is first.

**161—4.26(17A) Intervention.**

**4.26(1) Motion.** A motion for leave to intervene in a contested case proceeding shall state the grounds for the proposed intervention, the position and interest of the proposed intervenor, and the possible impact of intervention on the proceeding. A proposed answer or petition in intervention shall be attached to the motion. Any party may file a response within 14 days of service of the motion to intervene unless the time period is extended or shortened by the presiding officer.

**4.26(2) When filed.** Motion for leave to intervene shall be filed as early in the proceeding as possible to avoid adverse impact on existing parties or the conduct of the proceeding. Unless otherwise ordered, a motion for leave to intervene shall be filed before the prehearing conference, if any, or at least 20 days before the date scheduled for hearing. Any later motion must contain a statement of good cause for the failure to file in a timely manner. Unless inequitable or unjust, an intervenor shall be bound by any agreement, arrangement, or other matter previously raised in the case. Requests by untimely intervenors for continuances which would delay the proceeding will ordinarily be denied.

**4.26(3) Grounds for intervention.** The movant shall demonstrate that: (a) intervention would not unduly prolong the proceedings or otherwise prejudice the rights of existing parties; (b) the movant is likely to be aggrieved or adversely affected by a final order in the proceeding; and (c) the interests of the movant are not adequately represented by existing parties.

**4.26(4) Effect of intervention.** If appropriate, the presiding officer may order consolidation of the petitions and briefs of different parties whose interests are aligned with each other and limit the number of representatives allowed to participate actively in the proceedings. A person granted leave to intervene is a party to the proceeding. The order granting intervention may restrict the issues that may be

raised by the intervenor or otherwise condition the intervenor's participation in the proceeding.

**161—4.27(17A) No factual dispute contested cases.** If the parties agree that no dispute of material fact exists as to a matter that would be a contested case if such a dispute of fact existed, the parties may present all relevant admissible evidence either by stipulation or otherwise as agreed by the parties, without necessity for the production of evidence at an evidentiary hearing. If such agreement is reached, a jointly submitted schedule detailing the method and timetable for submission of the record, briefs and oral argument should be submitted to the presiding officer for approval as soon as practicable. If the parties cannot agree, any party may file and serve a motion for summary judgment pursuant to the rules governing such motions.

**161—4.28(17A) Awards of attorney's fees.**

**4.28(1) Retention of jurisdiction.** In any final decision in which it is determined that the complainant is entitled to an award of attorney's fees, but the actual amount has not yet been determined, there is, by operation of this rule, an express retention of jurisdiction of the case by the commission in order to determine the actual amount of attorney's fees to which the party is entitled and to enter a subsequent order awarding those fees, regardless of whether or not such retention of jurisdiction is expressed in the final decision. In such case, the decision is final in all other respects except the determination of the amount of the attorney's fees.

**4.28(2) Stipulation.** A final decision, in which it is determined that the complainant is entitled to an award of attorney's fees, may provide for an opportunity for the parties to file a written stipulation concerning the amount of the fees to be awarded. Any such stipulation entered into by the complainant(s) and respondent(s) is binding on the commission in the absence of evidence of fraud, wrongdoing, misrepresentation, or evidence that the stipulation is not in accord with the intent of the parties.

**4.28(3) Hearing.** If the amount of attorney's fees is not stipulated to by the parties, the presiding officer shall schedule a hearing on the issue of the amount of the attorney's fees. The hearing shall be governed by the same procedures as a hearing on the merits of a complaint except where otherwise ordered by the presiding officer. The parties may elect, by written stipulation, to utilize some method, such as stipulation of facts or submission of a documentary record, other than or complementary to a hearing, in order to make a record on attorney's fees which may then be reviewed by the presiding officer. By operation of this rule, the commission expresses its consent to such stipulations if agreed to by the parties seeking and contesting attorney's fees. The record of the original hearing is part of the record on the attorney's fee issue. Regardless of the method by which the record is made, the complainant has the burden of persuasion in proving attorney's fees.

**161—4.29(17A) Waiver, modification of rules.**

**4.29(1) By presiding officer.** Upon notice to all parties, the presiding officer may, with respect to matters pending before the presiding officer modify or waive any rule herein upon a determination that no party will be prejudiced and that the ends of justice will be served.

**4.29(2) By parties.** Unless otherwise precluded by law, the parties in a contested case proceeding may waive any provision of this chapter. However, the presiding officer, in the discretion of the presiding officer, may refuse to give effect to such a waiver when the presiding officer deems the waiver to be inconsistent with the public interest.

## CIVIL RIGHTS COMMISSION[161](cont'd)

**161—4.30(17A) Application for rehearing.**

**4.30(1)** By whom filed. Any party to a contested case proceeding may file an application for rehearing from a final order.

**4.30(2)** Content of application. The application for rehearing shall state on whose behalf it is filed, the specific grounds for rehearing, and the relief sought. In addition, the application shall state whether the applicant desires reconsideration of all or part of the agency decision on the existing record and whether, on the basis of the grounds enumerated in rule 4.21(17A), the applicant requests an opportunity to submit additional evidence.

**4.30(3)** Time of filing. The application shall be filed with the commission at its offices in Des Moines within 20 days after the issuance of the final decision.

**4.30(4)** Notice to other parties. A copy of the application shall be timely mailed by the applicant to all parties of record not joining therein. If the application does not contain a certificate of service, the commission shall serve copies on all parties.

**4.30(5)** Disposition. Any application for a rehearing shall be deemed denied unless the agency grants the application within 20 days after its filing.

**161—4.31(17A) Hearing—other reasons.** At any other time, the commission, executive director, or designee may, in its discretion, convene a hearing: whenever a problem of discrimination arises; in order to expedite the disposition of preliminary matters in any action before it; or when in the judgment of the commission, executive director or designee, the circumstances warrant.

These rules are intended to implement Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202.

**ARC 8795A****COMMUNITY ACTION AGENCIES  
DIVISION[427]****Notice of Intended Action**

Twenty-five interested persons, a governmental subdivision, an agency or association of 25 or more persons may demand an oral presentation hereon as provided in Iowa Code section 17A.4(1)"b."

Notice is also given to the public that the Administrative Rules Review Committee may, on its own motion or on written request by any individual or group, review this proposed action under section 17A.8(6) at a regular or special meeting where the public or interested persons may be heard.

Pursuant to the authority of Iowa Code sections 17A.3 and 216A.92B, the Division of Community Action Agencies hereby gives Notice of Intended Action to adopt Chapter 3, "Petitions for Rule Making," Chapter 4, "Agency Procedure for Rule Making," Chapter 6, "Declaratory Orders," and Chapter 7, "Contested Cases," Iowa Administrative Code.

The adoption of Chapters 3, 4, 6 and 7 will provide the Division with rules governing procedures for petitions for rule making, procedures for rule making, declaratory orders and contested cases.

The Seventy-seventh General Assembly in 1998 Iowa Acts, chapter 1202, passed amendments to the Iowa Administrative Procedure Act. The Attorney General's Office drafted amendments to the Uniform Rules on Agency Procedure to implement the amendments to the Iowa Administrative Procedure Act. The Division is adopting the uniform rules which become effective July 1, 1999.

Any interested person may make written suggestions or comments on the amendments on or before April 13, 1999. Such written suggestions or comments should be directed to the Administrator, Community Action Agencies Division, Department of Human Rights, Lucas State Office Building, Des Moines, Iowa 50319.

Persons are also invited to present oral or written suggestions or comments at a public hearing which will be held on April 13, 1999, at 10 a.m. in the Director's Conference Room, Department of Human Rights, Lucas State Office Building, Des Moines, Iowa 50319. At the hearing, persons will be asked to confine their remarks to the subjects of the amendments.

Any persons who intend to attend a public hearing and have special requirements such as hearing or mobility impairments should contact the Division of Community Action Agencies and advise of specific needs.

These amendments are intended to implement Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202, and Iowa Code section 216A.92B.

The following amendments are proposed.

Adopt the following **new** chapters:

**CHAPTER 3****PETITIONS FOR RULE MAKING**

**427—3.1(17A) Adoption by reference.** The division of community action agencies hereby adopts the petitions for rule making segment of the Uniform Rules on Agency Procedure which are printed in the first volume of the Iowa Administrative Code, with the following amendments:

1. In lieu of the words "(designate office)", insert "Division of Community Action Agencies, Department of Human Rights, Lucas State Office Building, Des Moines, Iowa 50319".

2. In lieu of the words "(AGENCY NAME)", insert "DIVISION OF COMMUNITY ACTION AGENCIES".

3. In lieu of the words "(designate official by full title and address)", insert "Administrator, Division of Community Action Agencies, Department of Human Rights, Lucas State Office Building, Des Moines, Iowa 50319".

These rules are intended to implement Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202.

**CHAPTER 4****AGENCY PROCEDURE FOR RULE MAKING**

**427—4.1(17A) Adoption by reference.** The division of community action agencies hereby adopts the agency procedure for rule making segment of the Uniform Rules on Agency Procedure which are printed in the first volume of the Iowa Administrative Code, with the following amendments:

1. In lieu of the words "(commission, board, council, director)", insert "administrator".

2. In lieu of the words "(specify time period)", insert "one year".

3. In lieu of the words "(identify office and address)", insert "Administrator, Division of Community Action Agencies, Department of Human Rights, Lucas State Office Building, Des Moines, Iowa 50319".

4. In lieu of the words "(designate office and telephone number)", insert "the administrator at (515)281-3268".

5. In lieu of the words "(designate office)", insert "Division of Community Action Agencies, Department of Human Rights, Lucas State Office Building, Des Moines, Iowa 50319".

## COMMUNITY ACTION AGENCIES DIVISION[427](cont'd)

6. In lieu of the words "(specify the office and address)", insert "Division of Community Action Agencies, Department of Human Rights, Lucas State Office Building, Des Moines, Iowa 50319".

7. In lieu of the words "(agency head)", insert "administrator".

These rules are intended to implement Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202.

CHAPTER 6  
DECLARATORY ORDERS

**427—6.1(17A) Adoption by reference.** The division of community action agencies hereby adopts the declaratory orders segment of the Uniform Rules on Agency Procedure which are printed in the first volume of the Iowa Administrative Code, with the following amendments:

1. In lieu of the words "(designate agency)", insert "division of community action agencies".

2. In lieu of the words "(designate office)", insert "Division of Community Action Agencies, Department of Human Rights, Lucas State Office Building, Des Moines, Iowa 50319".

3. In lieu of the words "(AGENCY NAME)", insert "DIVISION OF COMMUNITY ACTION AGENCIES".

4. In lieu of the words "\_\_\_\_ days (15 or less)", insert "10 days".

5. In lieu of the words "\_\_\_\_ days" in subrule 6.3(1), insert "20 days".

6. In lieu of the words "(designate official by full title and address)", insert "Administrator, Division of Community Action Agencies, Department of Human Rights, Lucas State Office Building, Des Moines, Iowa 50319".

7. In lieu of the words "(specify office and address)", insert "Division of Community Action Agencies, Department of Human Rights, Lucas State Office Building, Des Moines, Iowa 50319".

8. In lieu of the words "(agency name)", insert "division of community action agencies".

9. In lieu of the words "(designate agency head)", insert "administrator".

These rules are intended to implement Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202.

CHAPTER 7  
CONTESTED CASES

**427—7.1(17A) Adoption by reference.** The division of community action agencies hereby adopts the contested cases segment of the Uniform Rules on Agency Procedure which are printed in the first volume of the Iowa Administrative Code, with the following amendments:

1. In lieu of the words "(agency name)", insert "division of community action agencies, department of human rights".

2. In lieu of the words "(designate official)", insert "administrator".

3. In subrule 7.3(2) delete the words "or by (specify rule number)".

4. In lieu of the words "(agency specifies class of contested case)", insert "division contested cases".

5. In lieu of the words "(specify office and address)", insert "Division of Community Action Agencies, Department of Human Rights, Lucas State Office Building, Des Moines, Iowa 50319".

6. In lieu of the words "(designate office)", insert "division of community action agencies".

7. In lieu of the words "(agency to designate person to whom violations should be reported)", insert "administrator".

8. In lieu of the words "(board, commission, director)", insert "administrator".

9. In lieu of the words "(the agency)", insert "division of community action agencies".

These rules are intended to implement Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202.

**ARC 8823A**

**COUNTY FINANCE  
COMMITTEE[547]**

**Notice of Intended Action**

Twenty-five interested persons, a governmental subdivision, an agency or association of 25 or more persons may demand an oral presentation hereon as provided in Iowa Code section 17A.4(1)"b."

Notice is also given to the public that the Administrative Rules Review Committee may, on its own motion or on written request by any individual or group, review this proposed action under section 17A.8(6) at a regular or special meeting where the public or interested persons may be heard.

Pursuant to the authority of Iowa Code section 333A.4(6), the County Finance Committee gives Notice of Intended Action to rescind Chapter 7, "Declaratory Rulings," and to adopt a new Chapter 7, "Declaratory Orders," and to amend Chapter 8, "Agency Procedure for Rule Making," Iowa Administrative Code.

The proposed amendments bring the Committee's rules on administrative rule making and declaratory orders into conformance with 1998 Iowa Acts, chapter 1202, which amended the Iowa Administrative Procedure Act.

The Committee's proposed amendments to its rules are based on the amendments to the Uniform Rules on Agency Procedure drafted by a task force from the Attorney General's Office and published in the first volume of the Iowa Administrative Code and the Iowa Administrative Bulletin on February 24, 1999.

Interested persons may make written comments or suggestions on the proposed amendments on or before April 13, 1999. Written materials should be addressed to the County Finance Committee, State Capitol, Room 12, Des Moines, Iowa 50319-0015, or faxed to (515)242-5897. E-mail may be sent to Ron.Amosson@idom.state.ia.us.

These amendments are intended to implement Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202, and Iowa Code section 25B.6.

The following amendments are proposed.

ITEM 1. Rescind 547—Chapter 7 and insert the following **new** 547—Chapter 7 in lieu thereof:

CHAPTER 7  
DECLARATORY ORDERS

The county finance committee incorporates the declaratory orders segment of the Uniform Rules on Agency Procedure which are printed in the first volume of the Iowa Administrative Code with the following amendments.

**547—7.1(17A) Petition for declaratory order.** In lieu of the words "(designate agency)", insert "committee". In lieu of the words "(designate office)", insert "the County Finance Committee, State Capitol, Room 12, Des Moines, Iowa

## COUNTY FINANCE COMMITTEE[547](cont'd)

50319-0015". In lieu of the words "(AGENCY NAME)", the heading on the petition form should read:

## BEFORE THE COUNTY FINANCE COMMITTEE

**547—7.2(17A) Notice of petition.** In lieu of the words "\_\_\_\_ days (15 or less)", insert "15 days". In lieu of the words "(designate agency)", insert "committee".

**547—7.3(17A) Intervention.**

**7.3(1)** In lieu of the words "within \_\_\_\_ days", insert "within 15 days". Strike the words "(after time for notice under X.2(17A))". In lieu of the number "X.8(17A)", insert "7.8(17A)".

**7.3(2)** In lieu of the words "(designate agency)", insert "the committee".

**7.3(3)** In lieu of the words "(designate office)", insert "the County Finance Committee, State Capitol, Room 12, Des Moines, Iowa 50319-0015". In lieu of the words "(designate agency)", insert "committee". In lieu of the words "(AGENCY NAME)", the heading on the petition form should read:

## BEFORE THE COUNTY FINANCE COMMITTEE

**547—7.4(17A) Briefs.** In lieu of the words "(designate agency)", insert "committee".

**547—7.5(17A) Inquiries.** In lieu of the words "(designate official by full title and address)", insert "the County Finance Committee, State Capitol, Room 12, Des Moines, Iowa 50319-0015".

**547—7.6(17A) Service and filing of petitions and other papers.**

**7.6(2)** In lieu of the words "(specify office and address)", insert "the County Finance Committee, State Capitol, Room 12, Des Moines, Iowa 50319-0015". In lieu of the words "(agency name)", insert "committee".

**7.6(3)** In lieu of the words "(uniform rule on contested cases X.12(17A))", insert "rule 481—10.12(17A)".

**547—7.7(17A) Consideration.** In lieu of the words "(designate agency)", insert "committee".

**547—7.8(17A) Action on petition.**

**7.8(1)** In lieu of the words "(designate agency head)", insert "county finance committee".

**7.8(2)** In lieu of the words "(contested case uniform rule X.2(17A))", insert "rule 481—10.1(10A)".

**547—7.9(17A) Refusal to issue order.**

**7.9(1)** In lieu of the words "(designate agency)", insert "committee".

**547—7.12(17A) Effect of a declaratory order.** In lieu of the words "(designate agency)", insert "committee".

These rules are intended to implement 1998 Iowa Acts, chapter 1202, section 13.

ITEM 2. Amend rule 547—8.5(17A) by inserting the following **new** subrule:

**8.5(5) Accessibility.** In lieu of the words "(designate office and telephone number)", insert "the county finance committee at (515)281-5598".

ITEM 3. Amend rule 547—8.6(17A), catchwords, by striking the word "flexibility" and renumber subrule 8.6(3) as subrule 8.6(2).

ITEM 4. Add **new** rule 547—8.10(17A) as follows:

**547—8.10(17A) Exemptions from public rule-making procedures.**

**8.10(2) Categories exempt.** In lieu of the words "(List here narrowly drawn classes of rules where such an exemption is justified and a brief statement of the reasons for exempting each of them)", insert the following:

"a. Rules which are mandated by federal law or regulation in any situation where the department has no option but to adopt specified rules or where federal funding is contingent upon the adoption of the rules;

"b. Rules which implement recent legislation when a statute provides for an effective date which does not allow for the usual notice and public participation requirements;

"c. Rules which confer a benefit or remove a restriction on the public or some segment of the public;

"d. Rules which are necessary because of imminent peril to the public health, safety or welfare; and

"e. Nonsubstantive rules intended to correct typographical errors, incorrect citations, or other errors in existing rules."

ITEM 5. Amend 547—Chapter 8, implementation clause, as follows:

These rules are intended to implement Iowa Code ~~section 8.6 chapter 17A as amended by 1998 Iowa Acts, chapter 1202, and Iowa Code section 25B.6.~~

**ARC 8858A****CREDIT UNION DIVISION[189]****Notice of Intended Action**

Twenty-five interested persons, a governmental subdivision, an agency or association of 25 or more persons may demand an oral presentation hereon as provided in Iowa Code section 17A.4(1)"b."

Notice is also given to the public that the Administrative Rules Review Committee may, on its own motion or on written request by any individual or group, review this proposed action under section 17A.8(6) at a regular or special meeting where the public or interested persons may be heard.

Pursuant to the authority of Iowa Code sections 17A.3(1)"b," 533.1 and 533.54, the Superintendent of Credit Unions hereby gives Notice of Intended Action to amend Chapter 4, "Procedure for Adoption of Rules," and to adopt Chapter 20, "Petitions for Rule Making," Chapter 21, "Declaratory Orders," and Chapter 22, "Contested Cases," Iowa Administrative Code.

These amendments revise the Division's rules governing procedures for rule making, petitions for rule making and declaratory orders and add a chapter on contested cases.

The Seventy-seventh General Assembly passed amendments to the Iowa Administrative Procedure Act in 1998 Iowa Acts, chapter 1202. A task force from the Attorney General's Office drafted amendments to the Uniform Rules on Agency Procedure to implement the amendments to the Iowa Administrative Procedure Act. The Division's proposed amendments to its rule making and declaratory order rules are based on the amendments of the Attorney General's task force, with some omissions and modifications to fit the Division. The task force's amendments are available at the State Law Library, Capitol Building, Des Moines, Iowa, or on the Attorney General's website <http://www.state.ia.us/government/ag/deptdir.htm>.

With these revisions, the Division's rules will be in compliance with 1998 Iowa Acts, chapter 1202. The major

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changes governing the rule-making process in chapter 1202, which are to be effective July 1, 1999, are as follows:

- The requirement for an economic impact statement if requested by members of the Administrative Rules Review Committee (ARRC) is deleted and replaced with a requirement for a regulatory analysis if requested by the ARRC or the Administrative Rules Coordinator. In addition, if the rule would have a substantial impact on small business, a request for a fiscal impact statement may also be made by at least 25 persons provided that each represents a small business, or an organization representing at least 25 small businesses.

- The ARRC, the Administrative Rules Coordinator, a political subdivision, a state agency, 25 persons signing one request, or an association having not less than 25 members may request the Division to conduct a formal review of a specified rule to determine whether the rule should be repealed or amended or a new rule adopted instead. If the Division has not conducted such a review of the specified rule within a period of five years prior to the filing with the Division of that written request, the Division shall prepare within a reasonable time a written report with respect to the rule summarizing the Division's findings, its supporting reasons, and any proposed course of action. The report must include a concise statement of the rule's effectiveness, including a summary of data supporting the conclusions reached; written criticisms of the rules received during the previous five years, including a summary of any petitions for waiver of the rule (i.e., requests for exceptions to policy) tendered to the Division or granted by the Division; and alternative solutions regarding the subject matter of the criticisms and the reasons they were rejected or the changes made in the rule in response to those criticisms and the reasons for the changes. A copy of the report is sent to the ARRC and the Administrative Rules Coordinator.

- The current law regarding declaratory rulings is deleted and replaced with declaratory orders. The purpose is the same, but requirements are more specific than in current law. Rules are added to provide for petitions for intervention.

Public comments concerning the proposed amendments will be accepted until 4:30 p.m. on April 13, 1999. Interested persons may submit written or oral comments by contacting James E. Forney, Superintendent of Credit Unions, Credit Union Division, 200 E. Grand, Suite 370, Des Moines, Iowa 50309-1827; telephone number (515)281-6514 or by fax at (515)281-7595 or by E-mail at Forney@comm4.state.ia.us.

A public hearing to receive comments about the proposed amendments will be held on April 13, 1999, at 10 a.m. at the above address in the Credit Union Division conference room. Individuals interested in providing comments at the hearing should contact James Forney by 4 p.m. on April 12, 1999, to be placed on the hearing agenda.

These amendments are intended to implement Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202.

The following amendments are proposed.

ITEM 1. Rescind rules **189—4.2(17A)** and **189—4.3(17A)**.

ITEM 2. Adopt the following new chapters:

**CHAPTER 20**  
**PETITIONS FOR RULE MAKING**

**189—20.1(17A) Petition for rule making.** Any person may file a petition for rule making with the division at Credit Union Division, Attn: Rules Coordinator, 200 East Grand,

Suite 370, Des Moines, Iowa 50309-1827. A petition is deemed filed when it is received by that office. The division must provide the petitioner with a file-stamped copy of the petition if the petitioner provides the division an extra copy for this purpose. The petition must be typewritten, or legibly handwritten in ink, and must substantially conform to the following form:

**DEPARTMENT OF COMMERCE**  
**CREDIT UNION DIVISION**

Petition by (Name of Petitioner) for the (adoption, amendment, or repeal) of rules relating to (state subject matter).	}	<b>PETITION FOR RULE MAKING</b>
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The petition must provide the following information:

- A statement of the specific rule-making action sought by the petitioner including the text or a summary of the contents of the proposed rule or amendment to a rule and, if it is a petition to amend or repeal a rule, a citation and the relevant language to the particular portion or portions of the rule proposed to be amended or repealed.

- A citation to any law deemed relevant to the division's authority to take the action urged or to the desirability of that action.

- A brief summary of petitioner's arguments in support of the action urged in the petition.

- A brief summary of any data supporting the action urged in the petition.

- The names and addresses of other persons, or a description of any class of persons, known by petitioner to be affected by or interested in, the proposed action which is the subject of the petition.

- Any request by petitioner for a meeting provided for by rule 20.4(17A).

**20.1(1)** The petition must be dated and signed by the petitioner or the petitioner's representative. It must also include the name, mailing address, and telephone number of the petitioner and petitioner's representative, and a statement indicating the person to whom communications concerning the petition should be directed.

**20.1(2)** The division may deny a petition because it does not substantially conform to the required form.

**189—20.2(17A) Briefs.** The petitioner may attach a brief to the petition in support of the action urged in the petition. The division may request a brief from the petitioner or from any other person concerning the substance of the petition.

**189—20.3(17A) Inquiries.** Inquiries concerning the status of a petition for rule making may be made to Credit Union Division, Attn: Rules Coordinator, 200 East Grand, Suite 370, Des Moines, Iowa 50309-1827.

**189—20.4(17A) Division consideration.**

**20.4(1)** Within 14 days after the filing of a petition, the division must submit a copy of the petition and any accompanying brief to the administrative rules coordinator and to the administrative rules review committee. Upon request by petitioner in the petition, the division must schedule a brief and informal meeting between the petitioner and the division, a member of the division, or a member of the staff of the division, to discuss the petition. The division may request the petitioner to submit additional information or argument concerning the petition. The division may also solicit com-

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ments from any person on the substance of the petition. Also, comments on the substance of the petition may be submitted to the division by any person.

20.4(2) Within 60 days after the filing of the petition, or within any longer period agreed to by the petitioner, the division must, in writing, deny the petition, and notify petitioner of its action and the specific grounds for the denial, or grant the petition and notify petitioner that it has instituted rule-making proceedings on the subject of the petition. Petitioner shall be deemed notified of the denial or grant of the petition on the date when the division mails or delivers the required notification to petitioner.

20.4(3) Denial of a petition because it does not substantially conform to the required form does not preclude the filing of a new petition on the same subject that seeks to eliminate the grounds for the division's rejection of the petition.

These rules are intended to implement Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202.

CHAPTER 21
DECLARATORY ORDERS

189-21.1(17A) Petition for declaratory order. Any person may file a petition with the credit union division for a declaratory order as to the applicability to specified circumstances of a statute, rule, or order within the primary jurisdiction of the credit union division, at Credit Union Division, Attn: Rules Coordinator, 200 East Grand Ave., Suite 370, Des Moines, Iowa 50309-1827. A petition is deemed filed when it is received by that office. The division shall provide the petitioner with a file-stamped copy of the petition if the petitioner provides the division an extra copy for this purpose. The petition must be typewritten or legibly handwritten in ink and must substantially conform to the following form:

DEPARTMENT OF COMMERCE
CREDIT UNION DIVISION

Petition by (Name of Petitioner) for a Declaratory Order on (Cite provisions of law involved). } PETITION FOR DECLARATORY ORDER

The petition must provide the following information:

- 1. A clear and concise statement of all relevant facts on which the order is requested.
2. A citation and the relevant language of the specific statutes, rules, policies, decisions, or orders, whose applicability is questioned, and any other relevant law.
3. The questions petitioner wants answered, stated clearly and concisely.
4. The answers to the questions desired by the petitioner and a summary of the reasons urged by the petitioner in support of those answers.
5. The reasons for requesting the declaratory order and disclosure of the petitioner's interest in the outcome.
6. A statement indicating whether the petitioner is currently a party to another proceeding involving the questions at issue and whether, to the petitioner's knowledge, those questions have been decided by, are pending determination by, or are under investigation by, any governmental entity.
7. The names and addresses of other persons, or a description of any class of persons, known by petitioner to be affected by, or interested in, the questions presented in the petition.

8. Any request by petitioner for a meeting provided for by 21.7(17A).

The petition must be dated and signed by the petitioner or the petitioner's representative. It must also include the name, mailing address, and telephone number of the petitioner and petitioner's representative and a statement indicating the person to whom communications concerning the petition should be directed.

189-21.2(17A) Notice of petition. Within 15 days after receipt of a petition for a declaratory order, the division shall give notice of the petition to all persons not served by the petitioner pursuant to 21.6(17A) to whom notice is required by any provision of law. The division may also give notice to any other persons.

189-21.3(17A) Intervention.

21.3(1) Persons who qualify under any applicable provision of law as an intervenor and who file a petition for intervention within 21 days of the filing of a petition for declaratory order shall be allowed to intervene in a proceeding for a declaratory order.

21.3(2) Any person who files a petition for intervention at any time prior to the issuance of an order may be allowed to intervene in a proceeding for a declaratory order at the discretion of the credit union division.

21.3(3) A petition for intervention shall be filed at Credit Union Division, Attn: Rules Coordinator, 200 East Grand Ave., Suite 370, Des Moines, Iowa 50309-1827. Such a petition is deemed filed when it is received by that office. The division will provide the petitioner with a file-stamped copy of the petition for intervention if the petitioner provides an extra copy for this purpose. A petition for intervention must be typewritten or legibly handwritten in ink and must substantially conform to the following form:

DEPARTMENT OF COMMERCE
CREDIT UNION DIVISION

Petition by (Name of Original Petitioner) for a Declaratory Order on (Cite provisions of law cited in original petition). } PETITION FOR INTERVENTION

The petition for intervention must provide the following information:

- 1. Facts supporting the intervenor's standing and qualifications for intervention.
2. The answers urged by the intervenor to the question or questions presented and a summary of the reasons urged in support of those answers.
3. Reasons for requesting intervention and disclosure of the intervenor's interest in the outcome.
4. A statement indicating whether the intervenor is currently a party to any proceeding involving the questions at issue and whether, to the intervenor's knowledge, those questions have been decided by, are pending determination by, or are under investigation by, any governmental entity.
5. The names and addresses of any additional persons, or a description of any additional class of persons, known by the intervenor to be affected by, or interested in, the questions presented.
6. Whether the intervenor consents to be bound by the determination of the matters presented in the declaratory order proceeding.

## CREDIT UNION DIVISION[189](cont'd)

The petition must be dated and signed by the intervenor or the intervenor's representative. It must also include the name, mailing address, and telephone number of the intervenor and intervenor's representative, and a statement indicating the person to whom communications should be directed.

**189—21.4(17A) Briefs.** The petitioner or any intervenor may file a brief in support of the position urged. The credit union division may request a brief from the petitioner, any intervenor, or any other person concerning the questions raised.

**189—21.5(17A) Inquiries.** Inquiries concerning the status of a declaratory order proceeding may be made to Credit Union Division, Attn: Rules Coordinator, 200 East Grand Ave., Suite 370, Des Moines, Iowa 50309-1827.

**189—21.6(17A) Service and filing of petitions and other papers.**

**21.6(1)** When service required. Except where otherwise provided by law, every petition for declaratory order, petition for intervention, brief, or other paper filed in a proceeding for a declaratory order shall be served upon each of the parties of record to the proceeding, and on all other persons identified in the petition for declaratory order or petition for intervention as affected by or interested in the questions presented, simultaneously with their filing. The party filing a document is responsible for service on all parties and other affected or interested persons.

**21.6(2)** Filing—when required. All petitions for declaratory orders, petitions for intervention, briefs, or other papers in a proceeding for a declaratory order shall be filed with Credit Union Division, Attn: Rules Coordinator, 200 East Grand Ave., Suite 370, Des Moines, Iowa 50309-1827. All petitions, briefs, or other papers that are required to be served upon a party shall be filed simultaneously with the division.

**21.6(3)** Method of service, time of filing, and proof of mailing. Method of service, time of filing, and proof of mailing shall be as provided by rule 189—22.12(17A).

**189—21.7(17A) Consideration.** Upon request by petitioner, the credit union division must schedule a brief and informal meeting between the original petitioner, all intervenors, and the credit union division, a member of the credit union division, or a member of the staff of the credit union division, to discuss the questions raised. The division may solicit comments from any person on the questions raised. Also, comments on the questions raised may be submitted to the credit union division by any person.

**189—21.8(17A) Action on petition.**

**21.8(1)** Within the time allowed by 1998 Iowa Acts, chapter 1202, section 13(5), after receipt of a petition for a declaratory order, the superintendent or the superintendent's designee shall take action on the petition as required by 1998 Iowa Acts, chapter 1202, section 13(5).

**21.8(2)** The date of issuance of an order or of a refusal to issue an order is as defined in rule 189—22.2(17A).

**189—21.9(17A) Refusal to issue order.**

**21.9(1)** The division shall not issue a declaratory order where prohibited by 1998 Iowa Acts, chapter 1202, section 13(1), and may refuse to issue a declaratory order on some or all questions raised for the following reasons:

1. The petition does not substantially comply with the required form.

2. The petition does not contain facts sufficient to demonstrate that the petitioner will be aggrieved or adversely affected by the failure of the division to issue an order.

3. The credit union division does not have jurisdiction over the questions presented in the petition.

4. The questions presented by the petition are also presented in a current rule making, contested case, or other division or judicial proceeding, that may definitively resolve them.

5. The questions presented by the petition would more properly be resolved in a different type of proceeding or by another body with jurisdiction over the matter.

6. The facts or questions presented in the petition are unclear, overbroad, insufficient, or otherwise inappropriate as a basis upon which to issue an order.

7. There is no need to issue an order because the questions raised in the petition have been settled due to a change in circumstances.

8. The petition is not based upon facts calculated to aid in the planning of future conduct but is, instead, based solely upon prior conduct in an effort to establish the effect of that conduct or to challenge a division decision already made.

9. The petition requests a declaratory order that would necessarily determine the legal rights, duties, or responsibilities of other persons who have not joined in the petition, intervened separately, or filed a similar petition and whose position on the questions presented may fairly be presumed to be adverse to that of petitioner.

10. The petitioner requests the credit union division to determine whether a statute is unconstitutional on its face.

**21.9(2)** A refusal to issue a declaratory order must indicate the specific grounds for the refusal and constitutes final division action on the petition.

**21.9(3)** Refusal to issue a declaratory order pursuant to this provision does not preclude the filing of a new petition that seeks to eliminate the grounds for the refusal to issue an order.

**189—21.10(17A) Contents of declaratory order—effective date.** In addition to the order itself, a declaratory order must contain the date of its issuance, the name of petitioner and all intervenors, the specific statutes, rules, policies, decisions, or orders involved, the particular facts upon which it is based, and the reasons for its conclusion.

A declaratory order is effective on the date of issuance.

**189—21.11(17A) Copies of orders.** A copy of all orders issued in response to a petition for a declaratory order shall be mailed promptly to the original petitioner and all intervenors.

**189—21.12(17A) Effect of a declaratory order.** A declaratory order has the same status and binding effect as a final order issued in a contested case proceeding. It is binding on the credit union division, the petitioner, and any intervenors and is applicable only in circumstances where the relevant facts and the law involved are indistinguishable from those on which the order was based. As to all other persons, a declaratory ruling serves only as precedent and is not binding on the division. The issuance of a declaratory order constitutes final division action on the petition.

These rules are intended to implement Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202.

CHAPTER 22  
CONTESTED CASES

**189—22.1(17A) Scope and applicability.** Except when inconsistent with Iowa Code chapter 533, this chapter applies to contested case proceedings conducted by the credit union division.

## CREDIT UNION DIVISION[189](cont'd)

**189—22.2(17A) Definitions.** Except where otherwise specifically defined by law:

“Contested case” means a proceeding defined by Iowa Code section 17A.2(5) and includes any matter defined as a no factual dispute contested case under 1998 Iowa Acts, chapter 1202, section 14.

“Issuance” means the date of mailing of a decision or order or date of delivery if service is by other means unless another date is specified in the order.

“Party” means each person or agency named or admitted as a party or properly seeking and entitled as of right to be admitted as a party.

“Presiding officer” means the superintendent of credit unions, the superintendent’s designee or, under certain circumstances, the administrative law judge.

“Proposed decision” means the presiding officer’s recommended findings of fact, conclusions of law, decision, and order in a contested case in which the superintendent did not preside.

**189—22.3(17A) Time requirements.**

**22.3(1)** Time shall be computed as provided in Iowa Code subsection 4.1(34).

**22.3(2)** For good cause, the presiding officer may extend or shorten the time to take any action, except as precluded by statute. Except for good cause stated in the record, before extending or shortening the time to take any action, the presiding officer shall afford all parties an opportunity to be heard or to file written arguments.

**189—22.4(17A) Requests for contested case proceeding.**

Any person claiming an entitlement to a contested case proceeding shall file a written request for such a proceeding within the time specified by the particular rules or statutes governing the subject matter or, in the absence of such law, the time specified in the division action in question.

The request for a contested case proceeding should state the name and address of the requester, identify the specific division action which is disputed and, where the requester is represented by a lawyer, identify the provisions of law or precedent requiring or authorizing the holding of a contested case proceeding in the particular circumstances involved, and include a short and plain statement of the issues of material fact in dispute.

**189—22.5(17A) Notice of hearing.**

**22.5(1)** Delivery. Delivery of the notice of hearing constitutes the commencement of the contested case proceeding. Delivery may be executed by:

- a. Personal service as provided in the Iowa Rules of Civil Procedure; or
- b. Certified mail, return receipt requested; or
- c. First-class mail; or
- d. Publication, as provided in the Iowa Rules of Civil Procedure.

**22.5(2)** Contents. The notice of hearing shall contain the following information:

- a. A statement of the time, place, and nature of the hearing;
- b. A statement of the legal authority and jurisdiction under which the hearing is to be held;
- c. A reference to the particular sections of the statutes and rules involved;
- d. A short and plain statement of the matters asserted. If the division or other party is unable to state the matters in detail at the time the notice is served, the initial notice may be limited to a statement of the issues involved. Thereafter,

upon application, a more definite and detailed statement shall be furnished;

e. Identification of all parties including the name, address and telephone number of the person who will act as advocate for the division or the state and of parties’ counsel where known;

f. Reference to the procedural rules governing conduct of the contested case proceeding;

g. Reference to the procedural rules governing informal settlement;

h. Identification of the presiding officer, if known. If not known, a description of who will serve as presiding officer (e.g., superintendent, superintendent’s designee, administrative law judge from the department of inspections and appeals); and

i. Notification of the time period in which a party may request, pursuant to 1998 Iowa Acts, chapter 1202, section 15(1), and rule 22.6(17A), that the presiding officer be an administrative law judge.

**189—22.6(17A) Presiding officer.**

**22.6(1)** Any party who wishes to request that the presiding officer assigned to render a proposed decision be an administrative law judge employed by the department of inspections and appeals must file a written request within 20 days after service of a notice of hearing which identifies or describes the presiding officer as the division head or members of the division.

**22.6(2)** The superintendent may deny the request only upon a finding that one or more of the following apply:

a. Neither the division nor any officer of the division under whose authority the contested case is to take place is a named party to the proceeding or a real party in interest to that proceeding.

b. There is a compelling need to expedite issuance of a final decision in order to protect the public health, safety, or welfare.

c. An administrative law judge with the qualifications identified in subrule 22.6(4) is unavailable to hear the case within a reasonable time.

d. The case involves significant policy issues of first impression that are inextricably intertwined with the factual issues presented.

e. The demeanor of the witnesses is likely to be dispositive in resolving the disputed factual issues.

f. Funds are unavailable to pay the costs of an administrative law judge and an interdivision appeal.

g. The request was not timely filed.

h. The request is not consistent with a specified statute.

**22.6(3)** The superintendent shall issue a written ruling specifying the grounds for the decision within 20 days after a request for an administrative law judge is filed. If the ruling is contingent upon the availability of an administrative law judge with the qualifications identified in subrule 22.6(4), the parties shall be notified at least 10 days prior to hearing if a qualified administrative law judge will not be available.

**22.6(4)** An administrative law judge assigned to act as presiding officer shall have the following technical expertise unless waived by the division: An administrative law judge shall have had at least five years’ experience as an executive officer in a credit union or in the regulation or examination of credit unions.

**22.6(5)** Except as provided otherwise by another provision of law, all rulings by an administrative law judge acting as presiding officer are subject to appeal to the superintendent. A party must seek any available intradivision appeal in order to exhaust adequate administrative remedies.

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**22.6(6)** Unless otherwise provided by law, the superintendent when reviewing a proposed decision upon intradivision appeal, shall have the powers of and shall comply with the provisions of this chapter which apply to presiding officers.

**189—22.7(17A) Waiver of procedures.** Unless otherwise precluded by law, the parties in a contested case proceeding may waive any provision of this chapter. However, the division in its discretion may refuse to give effect to such a waiver when it deems the waiver to be inconsistent with the public interest.

**189—22.8(17A) Telephone proceedings.** The presiding officer may resolve preliminary procedural motions by telephone conference in which all parties have an opportunity to participate. Other telephone proceedings may be held with the consent of all parties. The presiding officer will determine the location of the parties and witnesses for telephone hearings. The convenience of the witnesses or parties, as well as the nature of the case, will be considered when location is chosen.

**189—22.9(17A) Disqualification.**

**22.9(1)** A presiding officer or other person shall withdraw from participation in the making of any proposed or final decision in a contested case if that person:

- a. Has a personal bias or prejudice concerning a party or a representative of a party;
- b. Has personally investigated, prosecuted or advocated in connection with that case, the specific controversy underlying that case, another pending factually related contested case, or a pending factually related controversy that may culminate in a contested case involving the same parties;
- c. Is subject to the authority, direction or discretion of any person who has personally investigated, prosecuted or advocated in connection with that contested case, the specific controversy underlying that contested case, or a pending factually related contested case or controversy involving the same parties;
- d. Has acted as counsel to any person who is a private party to that proceeding within the past two years;
- e. Has a personal financial interest in the outcome of the case or any other significant personal interest that could be substantially affected by the outcome of the case;
- f. Has a spouse or relative within the third degree of relationship that: (1) is a party to the case, or an officer, director or trustee of a party; (2) is a lawyer in the case; (3) is known to have an interest that could be substantially affected by the outcome of the case; or (4) is likely to be a material witness in the case; or
- g. Has any other legally sufficient cause to withdraw from participation in the decision making in that case.

**22.9(2)** The term "personally investigated" means taking affirmative steps to interview witnesses directly or to obtain documents or other information directly. The term "personally investigated" does not include general direction and supervision of assigned investigators, unsolicited receipt of information which is relayed to assigned investigators, review of another person's investigative work product in the course of determining whether there is probable cause to initiate a proceeding, or exposure to factual information while performing other division functions, including fact gathering for purposes other than investigation of the matter which culminates in a contested case. Factual information relevant to the merits of a contested case received by a person who later serves as presiding officer in that case shall be disclosed if required by Iowa Code section 17A.17 as amended by 1998

Iowa Acts, chapter 1202, section 19, and subrules 22.9(3) and 22.23(9).

**22.9(3)** In a situation where a presiding officer or other person knows of information which might reasonably be deemed to be a basis for disqualification and decides voluntary withdrawal is unnecessary, that person shall submit the relevant information for the record by affidavit and shall provide for the record a statement of the reasons for the determination that withdrawal is unnecessary.

**22.9(4)** If a party asserts disqualification on any appropriate ground, including those listed in subrule 22.9(1), the party shall file a motion supported by an affidavit pursuant to 1998 Iowa Acts, chapter 1202, section 19(7). The motion must be filed as soon as practicable after the reason alleged in the motion becomes known to the party.

If, during the course of the hearing, a party first becomes aware of evidence of bias or other grounds for disqualification, the party may move for disqualification but must establish the grounds by the introduction of evidence into the record.

If the presiding officer determines that disqualification is appropriate, the presiding officer or other person shall withdraw. If the presiding officer determines that withdrawal is not required, the presiding officer shall enter an order to that effect. A party asserting disqualification may seek an interlocutory appeal under rule 22.25(17A) and seek a stay under rule 22.29(17A).

**189—22.10(17A) Consolidation—severance.**

**22.10(1)** Consolidation. The presiding officer may consolidate any or all matters at issue in two or more contested case proceedings where: (a) the matters at issue involve common parties or common questions of fact or law; (b) consolidation would expedite and simplify consideration of the issues involved; and (c) consolidation would not adversely affect the rights of any of the parties to those proceedings.

**22.10(2)** Severance. The presiding officer may, for good cause shown, order any contested case proceedings or portions thereof severed.

**189—22.11(17A) Pleadings.**

**22.11(1)** Petition. A petition in a contested case proceeding shall state in separately numbered paragraphs the following:

- a. The persons or entities on whose behalf the petition is filed;
- b. The particular provisions of statutes and rules involved;
- c. The relief demanded and the facts and law relied upon for such relief; and
- d. The name, address and telephone number of the petitioner and the petitioner's attorney, if any.

**22.11(2)** Answer. An answer shall be filed within 20 days of service of a petition unless otherwise ordered. A party may move to dismiss or apply for a more definite and detailed statement when appropriate.

An answer shall show on whose behalf it is filed and specifically admit, deny, or otherwise answer all material allegations of the pleading to which it responds. It shall state any facts deemed to show an affirmative defense and contain as many additional defenses as the pleader may claim.

An answer shall state the name, address and telephone number of the person filing the answer, the person or entity on whose behalf it is filed, and the attorney representing that person, if any.

Any allegation in the petition not denied in the answer is considered admitted. The presiding officer may refuse to

## CREDIT UNION DIVISION[189](cont'd)

consider any defense not raised in the answer which could have been raised on the basis of facts known when the answer was filed if any party would be prejudiced.

**22.11(3) Amendment.** Any notice of hearing, petition, or other charging document may be amended before a responsive pleading has been filed. Amendments to pleadings after a responsive pleading has been filed and to an answer may be allowed with the consent of the other parties or in the discretion of the presiding officer who may impose terms or grant a continuance.

**189—22.12(17A) Service and filing of pleadings and other papers.**

**22.12(1)** When service required. Except where otherwise provided by law, every pleading, motion, document, or other paper filed in a contested case proceeding and every paper relating to discovery in such a proceeding shall be served upon each of the parties of record to the proceeding, including the person designated as advocate or prosecutor for the state or the division, simultaneously with their filing. Except for the original notice of hearing and an application for rehearing as provided in Iowa Code section 17A.16(2), the party filing a document is responsible for service on all parties.

**22.12(2) Service—how made.** Service upon a party represented by an attorney shall be made upon the attorney unless otherwise ordered. Service is made by delivery or by mailing a copy to the person's last-known address. Service by mail is complete upon mailing, except where otherwise specifically provided by statute, rule, or order.

**22.12(3) Filing—when required.** After the notice of hearing, all pleadings, motions, documents or other papers in a contested case proceeding shall be filed with Credit Union Division, Attn: Contested Case Coordinator, 200 East Grand Ave., Suite 370, Des Moines, Iowa 50309-1827. All pleadings, motions, documents or other papers that are required to be served upon a party shall be filed simultaneously with the credit union division.

**22.12(4) Filing—when made.** Except where otherwise provided by law, a document is deemed filed at the time it is delivered to the credit union division, delivered to an established courier service for immediate delivery to that office, or mailed by first-class mail or state interoffice mail to that office, so long as there is proof of mailing.

**22.12(5) Proof of mailing.** Proof of mailing includes either: a legible United States Postal Service postmark on the envelope, a certificate of service, a notarized affidavit, or a certification in substantially the following form:

I certify under penalty of perjury and pursuant to the laws of Iowa that, on (date of mailing), I mailed copies of (describe document) addressed to the Credit Union Division, Attn: Contested Case Coordinator, 200 East Grand Ave., Suite 370, Des Moines, Iowa 50309-1827 and to the names and addresses of the parties listed below by depositing the same in (a United States post office mailbox with correct postage properly affixed or state interoffice mail).

(Date) (Signature)

**189—22.13(17A) Discovery.**

**22.13(1)** Discovery procedures applicable in civil actions are applicable in contested cases. Unless lengthened or shortened by these rules or by order of the presiding officer, time periods for compliance with discovery shall be as provided in the Iowa Rules of Civil Procedure.

**22.13(2)** Any motion relating to discovery shall allege that the moving party has previously made a good-faith at-

tempt to resolve the discovery issues involved with the opposing party. Motions in regard to discovery shall be ruled upon by the presiding officer. Opposing parties shall be afforded the opportunity to respond within ten days of the filing of the motion unless the time is shortened as provided in subrule 22.13(1). The presiding officer may rule on the basis of the written motion and any response, or may order argument on the motion.

**22.13(3)** Evidence obtained in discovery may be used in the contested case proceeding if that evidence would otherwise be admissible in that proceeding.

**189—22.14(17A) Subpoenas.**

**22.14(1) Issuance.**

a. A division subpoena shall be issued to a party on request. Such a request must be in writing. In the absence of good cause for permitting later action, a request for a subpoena must be received at least three days before the scheduled hearing. The request shall include the name, address, and telephone number of the requesting party.

b. Except to the extent otherwise provided by law, parties are responsible for service of their own subpoenas and payment of witness fees and mileage expenses.

**22.14(2)** Motion to quash or modify. The presiding officer may quash or modify a subpoena for any lawful reason upon motion in accordance with the Iowa Rules of Civil Procedure. A motion to quash or modify a subpoena shall be set for argument promptly.

**189—22.15(17A) Motions.**

**22.15(1)** No technical form for motions is required. However, prehearing motions must be in writing, state the grounds for relief, and state the relief sought.

**22.15(2)** Any party may file a written response to a motion within ten days after the motion is served, unless the time period is extended or shortened by rules of the division or the presiding officer. The presiding officer may consider a failure to respond within the required time period in ruling on a motion.

**22.15(3)** The presiding officer may schedule oral argument on any motion.

**22.15(4)** Motions pertaining to the hearing must be filed and served at least ten days prior to the date of hearing unless there is good cause for permitting later action or the time for such action is lengthened or shortened by rule of the division or an order of the presiding officer.

**189—22.16(17A) Prehearing conference.**

**22.16(1)** Any party may request a prehearing conference. A written request for prehearing conference or an order for prehearing conference on the presiding officer's own motion shall be filed not less than seven days prior to the hearing date. A prehearing conference shall be scheduled not less than three business days prior to the hearing date.

Written notice of the prehearing conference shall be given by the presiding officer to all parties. For good cause the presiding officer may permit variances from this rule.

**22.16(2)** Each party shall bring to the prehearing conference:

a. A final list of the witnesses who the party anticipates will testify at hearing. Witnesses not listed may be excluded from testifying unless there was good cause for the failure to include their names; and

b. A final list of exhibits which the party anticipates will be introduced at hearing. Exhibits other than rebuttal exhibits that are not listed may be excluded from admission into evidence unless there was good cause for the failure to include them.

## CREDIT UNION DIVISION[189](cont'd)

c. Witness or exhibit lists may be amended subsequent to the prehearing conference within the time limits established by the presiding officer at the prehearing conference. Any such amendments must be served on all parties.

**22.16(3)** In addition to the requirements of subrule 22.16(2), the parties at a prehearing conference may:

- a. Enter into stipulations of law or fact;
- b. Enter into stipulations on the admissibility of exhibits;
- c. Identify matters which the parties intend to request be officially noticed;
- d. Enter into stipulations for waiver of any provision of law; and
- e. Consider any additional matters which will expedite the hearing.

**22.16(4)** Prehearing conferences shall be conducted by telephone unless otherwise ordered. Parties shall exchange and receive witness and exhibit lists in advance of a telephone prehearing conference.

**189—22.17(17A) Continuances.** Unless otherwise provided, applications for continuances shall be made to the presiding officer.

**22.17(1)** A written application for a continuance shall:

- a. Be made at the earliest possible time and no less than seven days before the hearing except in case of unanticipated emergencies;
- b. State the specific reasons for the request; and
- c. Be signed by the requesting party or the party's representative.

An oral application for a continuance may be made if the presiding officer waives the requirement for a written motion. However, a party making such an oral application for a continuance must confirm that request by written application within five days after the oral request unless that requirement is waived by the presiding officer. No application for continuance shall be made or granted without notice to all parties except in an emergency where notice is not feasible. The division may waive notice of such requests for a particular case or an entire class of cases.

**22.17(2)** In determining whether to grant a continuance, the presiding officer may consider:

- a. Prior continuances;
- b. The interests of all parties;
- c. The likelihood of informal settlement;
- d. The existence of an emergency;
- e. Any objection;
- f. Any applicable time requirements;
- g. The existence of a conflict in the schedules of counsel, parties, or witnesses;
- h. The timeliness of the request; and
- i. Other relevant factors.

The presiding officer may require documentation of any grounds for continuance.

**189—22.18(17A) Withdrawals.** A party requesting a contested case proceeding may withdraw that request prior to the hearing only in accordance with division rules. Unless otherwise provided, a withdrawal shall be with prejudice.

**189—22.19(17A) Intervention.**

**22.19(1)** Motion. A motion for leave to intervene in a contested case proceeding shall state the grounds for the proposed intervention, the position and interest of the proposed intervenor, and the possible impact of intervention on the proceeding. A proposed answer or petition in intervention shall be attached to the motion. Any party may file a response within 14 days of service of the motion to intervene

unless the time period is extended or shortened by the presiding officer.

**22.19(2)** When filed. Motion for leave to intervene shall be filed as early in the proceeding as possible to avoid adverse impact on existing parties or the conduct of the proceeding. Unless otherwise ordered, a motion for leave to intervene shall be filed before the prehearing conference, if any, or at least 20 days before the date scheduled for hearing. Any later motion must contain a statement of good cause for the failure to file in a timely manner. Unless inequitable or unjust, an intervenor shall be bound by any agreement, arrangement, or other matter previously raised in the case. Requests by untimely intervenors for continuances which would delay the proceeding will ordinarily be denied.

**22.19(3)** Grounds for intervention. The movant shall demonstrate that: (a) intervention would not unduly prolong the proceedings or otherwise prejudice the rights of existing parties; (b) the movant is likely to be aggrieved or adversely affected by a final order in the proceeding; and (c) the interests of the movant are not adequately represented by existing parties.

**22.19(4)** Effect of intervention. If appropriate, the presiding officer may order consolidation of the petitions and briefs of different parties whose interests are aligned with each other and limit the number of representatives allowed to participate actively in the proceedings. A person granted leave to intervene is a party to the proceeding. The order granting intervention may restrict the issues that may be raised by the intervenor or otherwise condition the intervenor's participation in the proceeding.

**189—22.20(17A) Hearing procedures.**

**22.20(1)** The presiding officer presides at the hearing, and may rule on motions, require briefs, issue a proposed decision, and issue such orders and rulings as will ensure the orderly conduct of the proceedings.

**22.20(2)** All objections shall be timely made and stated on the record.

**22.20(3)** Parties have the right to participate or to be represented in all hearings or prehearing conferences related to their case. Partnerships, corporations, or associations may be represented by any member, officer, director, or duly authorized agent. Any party may be represented by an attorney or another person authorized by law.

**22.20(4)** Subject to terms and conditions prescribed by the presiding officer, parties have the right to introduce evidence on issues of material fact, cross-examine witnesses present at the hearing as necessary for a full and true disclosure of the facts, present evidence in rebuttal, and submit briefs and engage in oral argument.

**22.20(5)** The presiding officer shall maintain the decorum of the hearing and may refuse to admit or may expel anyone whose conduct is disorderly.

**22.20(6)** Witnesses may be sequestered during the hearing.

**22.20(7)** The presiding officer shall conduct the hearing in the following manner:

- a. The presiding officer shall give an opening statement briefly describing the nature of the proceedings;
- b. The parties shall be given an opportunity to present opening statements;
- c. Parties shall present their cases in the sequence determined by the presiding officer;
- d. Each witness shall be sworn or affirmed by the presiding officer or the court reporter, and be subject to examination and cross-examination. The presiding officer may limit questioning in a manner consistent with law;

## CREDIT UNION DIVISION[189](cont'd)

e. When all parties and witnesses have been heard, parties may be given the opportunity to present final arguments.

**189—22.21(17A) Evidence.**

**22.21(1)** The presiding officer shall rule on admissibility of evidence and may, where appropriate, take official notice of facts in accordance with all applicable requirements of law.

**22.21(2)** Stipulation of facts is encouraged. The presiding officer may make a decision based on stipulated facts.

**22.21(3)** Evidence in the proceeding shall be confined to the issues as to which the parties received notice prior to the hearing unless the parties waive their right to such notice or the presiding officer determines that good cause justifies expansion of the issues. If the presiding officer decides to admit evidence on issues outside the scope of the notice over the objection of a party who did not have actual notice of those issues, that party, upon timely request, shall receive a continuance sufficient to amend pleadings and to prepare on the additional issue.

**22.21(4)** The party seeking admission of an exhibit must provide opposing parties with an opportunity to examine the exhibit prior to the ruling on its admissibility. Copies of documents should normally be provided to opposing parties.

All exhibits admitted into evidence shall be appropriately marked and be made part of the record.

**22.21(5)** Any party may object to specific evidence or may request limits on the scope of any examination or cross-examination. Such an objection shall be accompanied by a brief statement of the grounds upon which it is based. The objection, the ruling on the objection, and the reasons for the ruling shall be noted in the record. The presiding officer may rule on the objection at the time it is made or may reserve a ruling until the written decision.

**22.21(6)** Whenever evidence is ruled inadmissible, the party offering that evidence may submit an offer of proof on the record. The party making the offer of proof for excluded oral testimony shall briefly summarize the testimony or, with permission of the presiding officer, present the testimony. If the excluded evidence consists of a document or exhibit, it shall be marked as part of an offer of proof and inserted in the record.

**189—22.22(17A) Default.**

**22.22(1)** If a party fails to appear or participate in a contested case proceeding after proper service of notice, the presiding officer may, if no adjournment is granted, enter a default decision or proceed with the hearing and render a decision in the absence of the party.

**22.22(2)** Where appropriate and not contrary to law, any party may move for default against a party who has requested the contested case proceeding and has failed to file a required pleading or has failed to appear after proper service.

**22.22(3)** Default decisions or decisions rendered on the merits after a party has failed to appear or participate in a contested case proceeding become final division action unless, within 15 days after the date of notification or mailing of the decision, a motion to vacate is filed and served on all parties or an appeal of a decision on the merits is timely initiated within the time provided by rule 22.27(17A). A motion to vacate must state all facts relied upon by the moving party which establish that good cause existed for that party's failure to appear or participate at the contested case proceeding. Each fact so stated must be substantiated by at least one sworn affidavit of a person with personal knowledge of each such fact, which affidavit(s) must be attached to the motion.

**22.22(4)** The time for further appeal of a decision for which a timely motion to vacate has been filed is stayed pending a decision on the motion to vacate.

**22.22(5)** Properly substantiated and timely filed motions to vacate shall be granted only for good cause shown. The burden of proof as to good cause is on the moving party. Adverse parties shall have ten days to respond to a motion to vacate. Adverse parties shall be allowed to conduct discovery as to the issue of good cause and to present evidence on the issue prior to a decision on the motion, if a request to do so is included in that party's response.

**22.22(6)** "Good cause" for purposes of this rule shall have the same meaning as "good cause" for setting aside a default judgment under Iowa Rule of Civil Procedure 236.

**22.22(7)** A decision denying a motion to vacate is subject to further appeal within the time limit allowed for further appeal of a decision on the merits in the contested case proceeding. A decision granting a motion to vacate is subject to interlocutory appeal by the adverse party pursuant to rule 22.25(17A).

**22.22(8)** If a motion to vacate is granted and no timely interlocutory appeal has been taken, the presiding officer shall issue another notice of hearing and the contested case shall proceed accordingly.

**22.22(9)** A default decision may award any relief consistent with the request for relief made in the petition and embraced in its issues.

**22.22(10)** A default decision may provide either that the default decision is to be stayed pending a timely motion to vacate or that the default decision is to take effect immediately, subject to a request for stay under rule 22.29(17A).

**189—22.23(17A) Ex parte communication.**

**22.23(1)** Prohibited communications. Unless required by the disposition of ex parte matters specifically authorized by statute, following issuance of the notice of hearing, there shall be no communication, directly or indirectly, between the presiding officer and any party or representative of any party or any other person with a direct or indirect interest in such case in connection with any issue of fact or law in the case except upon notice and opportunity for all parties to participate. This does not prohibit persons jointly assigned such tasks from communicating with each other. Nothing in this provision is intended to preclude the presiding officer from communicating with members of the division or seeking the advice or help of persons other than those with a personal interest in, or those engaged in personally investigating as defined in subrule 22.9(2), prosecuting, or advocating in, either the case under consideration or a pending factually related case involving the same parties as long as those persons do not directly or indirectly communicate to the presiding officer any ex parte communications they have received of a type that the presiding officer would be prohibited from receiving or that furnish, augment, diminish, or modify the evidence in the record.

**22.23(2)** Prohibitions on ex parte communications commence with the issuance of the notice of hearing in a contested case and continue for as long as the case is pending.

**22.23(3)** Written, oral or other forms of communication are "ex parte" if made without notice and opportunity for all parties to participate.

**22.23(4)** To avoid prohibited ex parte communications, notice must be given in a manner reasonably calculated to give all parties a fair opportunity to participate. Notice of written communications shall be provided in compliance with rule 22.12(17A) and may be supplemented by telephone, facsimile, electronic mail or other means of notification.

## CREDIT UNION DIVISION[189](cont'd)

tion. Where permitted, oral communications may be initiated through conference telephone call including all parties or their representatives.

**22.23(5)** Persons who jointly act as presiding officer in a pending contested case may communicate with each other without notice or opportunity for parties to participate.

**22.23(6)** The executive director or other persons may be present in deliberations or otherwise advise the presiding officer without notice or opportunity for parties to participate as long as they are not disqualified from participating in the making of a proposed or final decision under any provision of law and they comply with subrule 22.23(1).

**22.23(7)** Communications with the presiding officer involving uncontested scheduling or procedural matters do not require notice or opportunity for parties to participate. Parties should notify other parties prior to initiating such contact with the presiding officer when feasible, and shall notify other parties when seeking to continue hearings or other deadlines pursuant to rule 22.17(17A).

**22.23(8)** Disclosure of prohibited communications. A presiding officer who receives a prohibited ex parte communication during the pendency of a contested case must initially determine if the effect of the communication is so prejudicial that the presiding officer should be disqualified. If the presiding officer determines that disqualification is warranted, a copy of any prohibited written communication, all written responses to the communication, a written summary stating the substance of any prohibited oral or other communication not available in written form for disclosure, all responses made, and the identity of each person from whom the presiding officer received a prohibited ex parte communication shall be submitted for inclusion in the record under seal by protective order. If the presiding officer determines that disqualification is not warranted, such documents shall be submitted for inclusion in the record and served on all parties. Any party desiring to rebut the prohibited communication must be allowed the opportunity to do so upon written request filed within ten days after notice of the communication.

**22.23(9)** Promptly after being assigned to serve as presiding officer at any stage in a contested case proceeding, a presiding officer shall disclose to all parties material factual information received through ex parte communication prior to such assignment unless the factual information has already been or shortly will be disclosed pursuant to Iowa Code section 17A.13(2) or through discovery. Factual information contained in an investigative report or similar document need not be separately disclosed by the presiding officer as long as such documents have been or will shortly be provided to the parties.

**22.23(10)** The presiding officer may render a proposed or final decision imposing appropriate sanctions for violations of this rule including default, a decision against the offending party, censure, or suspension or revocation of the privilege to practice before the division. Violation of ex parte communication prohibitions by division personnel shall be reported to the superintendent for possible sanctions including censure, suspension, dismissal, or other disciplinary action.

**189—22.24(17A) Recording costs.** Upon request, the division shall provide a copy of the whole or any portion of the record at cost. The cost of preparing a copy of the record or of transcribing the hearing record shall be paid by the requesting party.

Parties who request that a hearing be recorded by certified shorthand reporters rather than by electronic means shall

bear the cost of that recordation, unless otherwise provided by law.

**189—22.25(17A) Interlocutory appeals.** Upon written request of a party or on its own motion, the superintendent may review an interlocutory order of the presiding officer. In determining whether to do so, the superintendent shall weigh the extent to which its granting the interlocutory appeal would expedite final resolution of the case and the extent to which review of that interlocutory order by the division at the time it reviews the proposed decision of the presiding officer would provide an adequate remedy. Any request for interlocutory review must be filed within 14 days of issuance of the challenged order, but no later than the time for compliance with the order or the date of hearing, whichever is first.

**189—22.26(17A) Final decision.**

**22.26(1)** When the superintendent presides over the reception of evidence at the hearing, the superintendent's decision is a final decision.

**22.26(2)** When the superintendent does not preside at the reception of evidence, the presiding officer shall make a proposed decision. The proposed decision becomes the final decision of the division without further proceedings unless there is an appeal to, or review on motion of, the superintendent within the time provided in rule 22.27(17A).

**189—22.27(17A) Appeals and review.**

**22.27(1) Appeal by party.** Any adversely affected party may appeal a proposed decision to the superintendent within 30 days after issuance of the proposed decision.

**22.27(2) Review.** The superintendent may initiate review of a proposed decision on the superintendent's own motion at any time within 30 days following the issuance of such a decision.

**22.27(3) Notice of appeal.** An appeal of a proposed decision is initiated by filing a timely notice of appeal with the credit union division. The notice of appeal must be signed by the appealing party or a representative of that party and contain a certificate of service. The notice shall specify:

- a. The parties initiating the appeal;
- b. The proposed decision or order appealed from;
- c. The specific findings or conclusions to which exception is taken and any other exceptions to the decision or order;
- d. The relief sought;
- e. The grounds for relief.

**22.27(4) Requests to present additional evidence.** A party may request the taking of additional evidence only by establishing that the evidence is material, that good cause existed for the failure to present the evidence at the hearing, and that the party has not waived the right to present the evidence. A written request to present additional evidence must be filed with the notice of appeal or, by a nonappealing party, within 14 days of service of the notice of appeal. The superintendent may remand a case to the presiding officer for further hearing or may personally preside at the taking of additional evidence.

**22.27(5) Scheduling.** The division shall issue a schedule for consideration of the appeal.

**22.27(6) Briefs and arguments.** Unless otherwise ordered, within 20 days of the notice of appeal or order for review, each appealing party may file exceptions and briefs. Within 20 days thereafter, any party may file a responsive brief. Briefs shall cite any applicable legal authority and specify relevant portions of the record in that proceeding. Written requests to present oral argument shall be filed with the briefs.

## CREDIT UNION DIVISION[189](cont'd)

The superintendent may resolve the appeal on the briefs or provide an opportunity for oral argument. The superintendent may shorten or extend the briefing period as appropriate.

**189—22.28(17A) Applications for rehearing.**

**22.28(1)** By whom filed. Any party to a contested case proceeding may file an application for rehearing from a final order.

**22.28(2)** Content of application. The application for rehearing shall state on whose behalf it is filed, the specific grounds for rehearing, and the relief sought. In addition, the application shall state whether the applicant desires reconsideration of all or part of the division decision on the existing record and whether, on the basis of the grounds enumerated in subrule 22.27(4), the applicant requests an opportunity to submit additional evidence.

**22.28(3)** Time of filing. The application shall be filed with the credit union division within 20 days after issuance of the final decision.

**22.28(4)** Notice to other parties. A copy of the application shall be timely mailed by the applicant to all parties of record not joining therein. If the application does not contain a certificate of service, the credit union division shall serve copies on all parties.

**22.28(5)** Disposition. Any application for a rehearing shall be deemed denied unless the division grants the application within 20 days after its filing.

**189—22.29(17A) Stays of division actions.****22.29(1)** When available.

a. Any party to a contested case proceeding may petition the credit union division for a stay of an order issued in that proceeding or for other temporary remedies, pending review by the division. The petition shall be filed with the notice of appeal and shall state the reasons justifying a stay or other temporary remedy. The superintendent may rule on the stay or authorize the presiding officer to do so.

b. Any party to a contested case proceeding may petition the credit union division for a stay or other temporary remedies pending judicial review of all or part of that proceeding. The petition shall state the reasons justifying a stay or other temporary remedy.

**22.29(2)** When granted. In determining whether to grant a stay, the presiding officer or superintendent shall consider the factors listed in 1998 Iowa Acts, chapter 1202, section 23(5c).

**22.29(3)** Vacation. A stay may be vacated by the issuing authority upon application of the division or any other party.

**189—22.30(17A) No factual dispute contested cases.** If the parties agree that no dispute of material fact exists as to a matter that would be a contested case if such a dispute of fact existed, the parties may present all relevant admissible evidence either by stipulation or otherwise as agreed by the parties, without necessity for the production of evidence at an evidentiary hearing. If such agreement is reached, a jointly submitted schedule detailing the method and timetable for submission of the record, briefs and oral argument should be submitted to the presiding officer for approval as soon as practicable. If the parties cannot agree, any party may file and serve a motion for summary judgment pursuant to the rules governing such motions.

**189—22.31(17A) Emergency adjudicative proceedings.**

**22.31(1)** Necessary emergency action. To the extent necessary to prevent or avoid immediate danger to the public

health, safety, or welfare and, consistent with the Constitution and other provisions of law, the superintendent may issue a written order in compliance with 1998 Iowa Acts, chapter 1202, section 21, to suspend a license in whole or in part, order the cessation of any continuing activity, order affirmative action, or take other action within the jurisdiction of the superintendent by emergency adjudicative order. Before issuing an emergency adjudicative order the superintendent shall consider factors including, but not limited to, the following:

a. Whether there has been a sufficient factual investigation to ensure that the division is proceeding on the basis of reliable information;

b. Whether the specific circumstances which pose immediate danger to the public health, safety or welfare have been identified and determined to be continuing;

c. Whether the person required to comply with the emergency adjudicative order may continue to engage in other activities without posing immediate danger to the public health, safety or welfare;

d. Whether imposition of monitoring requirements or other interim safeguards would be sufficient to protect the public health, safety or welfare; and

e. Whether the specific action contemplated by the division is necessary to avoid the immediate danger.

**22.31(2)** Issuance of order.

a. An emergency adjudicative order shall contain findings of fact, conclusions of law, and policy reasons to justify the determination of an immediate danger in the superintendent's decision to take immediate action.

b. The written emergency adjudicative order shall be immediately delivered to persons who are required to comply with the order by utilizing one or more of the following procedures:

(1) Personal delivery;

(2) Certified mail, return receipt requested, to the last address on file with the division;

(3) Certified mail to the last address on file with the division;

(4) First-class mail to the last address on file with the division; or

(5) Fax. Fax may be used as the sole method of delivery if the person required to comply with the order has filed a written request that division orders be sent by fax and has provided a fax number for that purpose.

c. To the degree practicable, the division shall select the procedure for providing written notice that best ensures prompt, reliable delivery.

**22.31(3)** Oral notice. Unless the written emergency adjudicative order is provided by personal delivery on the same day that the order issues, the division shall make reasonable immediate efforts to contact by telephone the persons who are required to comply with the order.

**22.31(4)** Completion of proceedings. After the issuance of an emergency adjudicative order, the division shall proceed as quickly as feasible to complete any proceedings that would be required if the matter did not involve an immediate danger.

Issuance of a written emergency adjudicative order shall include notification of the date on which division proceedings are scheduled for completion. After issuance of an emergency adjudicative order, continuance of further division proceedings to a later date will be granted only in compelling circumstances upon application in writing.

CREDIT UNION DIVISION[189](cont'd)

These rules are intended to implement Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202.

## ARC 8802A

# CRIMINAL AND JUVENILE JUSTICE PLANNING DIVISION[428]

### Notice of Intended Action

Twenty-five interested persons, a governmental subdivision, an agency or association of 25 or more persons may demand an oral presentation hereon as provided in Iowa Code section 17A.4(1)"b."

Notice is also given to the public that the Administrative Rules Review Committee may, on its own motion or on written request by any individual or group, review this proposed action under section 17A.8(6) at a regular or special meeting where the public or interested persons may be heard.

Pursuant to the authority of Iowa Code sections 17A.3 and 216A.133, the Criminal and Juvenile Justice Planning Division hereby gives Notice of Intended Action to adopt Chapter 6, "Declaratory Orders," Chapter 7, "Petitions for Rule Making," and Chapter 8, "Agency Procedure for Rule Making," Iowa Administrative Code.

The adoption of Chapters 6, 7, and 8 will provide the Criminal and Juvenile Justice Planning Division with rules governing procedures for declaratory orders, petitions for rule making, and procedures for rule making.

The Seventy-seventh General Assembly in 1998 Iowa Acts, chapter 1202, amended the Iowa Administrative Procedure Act. The Attorney General's Office drafted amendments to the Uniform Rules on Agency Procedure to implement the amendments to the Iowa Administrative Procedure Act. The Division is adopting the uniform rules which become effective July 1, 1999.

Any interested person may make written suggestions or comments on these proposed amendments on or before April 13, 1999. Such written materials should be directed to the Administrator, Division of Criminal and Juvenile Justice Planning, Department of Human Rights, Lucas State Office Building, First Floor, Des Moines, Iowa 50319; fax (515) 242-6119.

Persons are also invited to present oral or written suggestions or comments at a public hearing which will be held on April 13, 1999, at 10 a.m. in the Director's Conference Room, Iowa Department of Human Rights, Lucas State Office Building, Des Moines, Iowa 50319. At the hearing, persons will be asked to confine their remarks to the subject of the adoption of these new chapters.

These rules are intended to implement Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202, and Iowa Code section 216A.133.

The following chapters are proposed.

Adopt the following new chapters:

### CHAPTER 6 DECLARATORY ORDERS

**428—6.1(17A) Adoption by reference.** The division of criminal and juvenile justice planning hereby adopts the declaratory orders segment of the Uniform Rules on Agency Procedure which are printed in the first volume of the Iowa Administrative Code, with the following amendments:

1. In lieu of the words "(designate agency)", insert "division of criminal and juvenile justice planning".

2. In lieu of the words "(designate office)", insert "Division of Criminal and Juvenile Justice Planning, Department of Human Rights, Lucas State Office Building, Des Moines, Iowa 50319".

3. In lieu of the words "(AGENCY NAME)", insert "DIVISION OF CRIMINAL AND JUVENILE JUSTICE PLANNING".

4. In lieu of the words "\_\_\_\_ days (15 or less)", insert "10 days".

5. In lieu of the words "\_\_\_\_ days" in subrule 6.3(1), insert "20 days".

6. In lieu of the words "(designate official by full title and address)", insert "Administrator, Division of Criminal and Juvenile Justice Planning, Department of Human Rights, Lucas State Office Building, Des Moines, Iowa 50319".

7. In lieu of the words "(specify office and address)", insert "Division of Criminal and Juvenile Justice Planning, Department of Human Rights, Lucas State Office Building, Des Moines, Iowa 50319".

8. In lieu of the words "(agency name)", insert "division of criminal and juvenile justice planning".

9. In lieu of the words "(designate agency head)", insert "administrator".

These rules are intended to implement Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202.

### CHAPTER 7 PETITIONS FOR RULE MAKING

**428—7.1(17A) Adoption by reference.** The division of criminal and juvenile justice planning hereby adopts the petitions for rule making segment of the Uniform Rules on Agency Procedure which are printed in the first volume of the Iowa Administrative Code, with the following amendments:

1. In lieu of the words "(designate office)", insert "Division of Criminal and Juvenile Justice Planning, Department of Human Rights, Lucas State Office Building, Des Moines, Iowa 50319".

2. In lieu of the words "(AGENCY NAME)", insert "DIVISION OF CRIMINAL AND JUVENILE JUSTICE PLANNING".

3. In lieu of the words "(designate official by full title and address)", insert "Administrator, Division of Criminal and Juvenile Justice Planning, Department of Human Rights, Lucas State Office Building, Des Moines, Iowa 50319".

These rules are intended to implement Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202.

### CHAPTER 8 AGENCY PROCEDURE FOR RULE MAKING

**428—8.1(17A) Adoption by reference.** The division of criminal and juvenile justice planning hereby adopts the agency procedure for rule making segment of the Uniform Rules on Agency Procedure which are printed in the first volume of the Iowa Administrative Code, with the following amendments:

1. In lieu of the words "(commission, board, council, director)", insert "administrator".

2. In lieu of the words "(specify time period)", insert "one year".

3. In lieu of the words "(identify office and address)", insert "Administrator, Division of Criminal and Juvenile Justice Planning, Department of Human Rights, Lucas State Office Building, Des Moines, Iowa 50319".

## CRIMINAL AND JUVENILE JUSTICE PLANNING DIVISION[428](cont'd)

4. In lieu of the words "(designate office and telephone number)", insert "the administrator at (515)242-5823".

5. In lieu of the words "(designate office)", insert "Division of Criminal and Juvenile Justice Planning, Department of Human Rights, Lucas State Office Building, Des Moines, Iowa 50319".

6. In lieu of the words "(specify the office and address)", insert "Division of Criminal and Juvenile Justice Planning, Department of Human Rights, Lucas State Office Building, Des Moines, Iowa 50319".

7. In lieu of the words "(agency head)", insert "administrator".

These rules are intended to implement Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202.

## ARC 8839A

CULTURAL AFFAIRS  
DEPARTMENT[221]

## Notice of Intended Action

Twenty-five interested persons, a governmental subdivision, an agency or association of 25 or more persons may demand an oral presentation hereon as provided in Iowa Code section 17A.4(1)"b."

Notice is also given to the public that the Administrative Rules Review Committee may, on its own motion or on written request by any individual or group, review this proposed action under section 17A.8(6) at a regular or special meeting where the public or interested persons may be heard.

Pursuant to the authority of Iowa Code section 303.1A(1), the Department of Cultural Affairs gives Notice of Intended Action to amend Chapter 1, "Organization and Operation," and to adopt Chapter 3, "Declaratory Orders," and Chapter 4, "Department Procedure for Rule Making," Iowa Administrative Code.

The amendments to Chapter 1 update information regarding Department divisions, addresses, and telephone numbers.

The adoption of new Chapters 3 and 4 will bring the Department into concurrence with the revisions to the Iowa Administrative Procedure Act as amended in 1998 Iowa Acts, chapter 1202. The Attorney General's Office drafted amendments to the Uniform Rules on Agency Procedure to implement the amendments to the Iowa Administrative Procedure Act. The Department's proposed new chapters are based on the draft amendments with some changes specific to the Department.

Any interested person may make written suggestions or comments on these proposed amendments through the close of business on April 13, 1999. Such written comments shall be addressed to Director, Department of Cultural Affairs, 600 E. Locust Street, Des Moines, Iowa 50319; fax (515) 242-6498.

Persons are also invited to present oral or written comments at a public hearing which will be held on April 13, 1999, at 1 p.m. in the Director's Conference Room, Department of Cultural Affairs, 600 E. Locust Street, Des Moines, Iowa. At the hearing, persons will be asked to confine their remarks to the subject of the amendments.

These amendments are intended to implement Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202, and Iowa Code sections 303.1(3)"a" to "d," and 303.1A(1).

The following amendments are proposed:

ITEM 1. Amend rule 221—1.1(303) as follows:

**221—1.1(303) Definitions.** The definitions of terms listed in Iowa Code section 17A.2 shall apply for these terms as they are used throughout this chapter. In addition, as used in this chapter:

"Arts division" means the arts division of the department of cultural affairs.

~~"Council" means the cultural affairs advisory council.~~

~~"Cultural affairs advisory council" means the nine-member advisory council as defined in subrule 4.1(1).~~

"Department" means the department of cultural affairs.

"Director" means the director of the department of cultural affairs.

"Historical division" means the historical division of the department of cultural affairs.

~~"Library division" means the library division of the department of cultural affairs.~~

~~"Public broadcasting division" means the public broadcasting division of the department of cultural affairs.~~

ITEM 2. Amend rule 221—1.2(303) as follows:

**221—1.2(303) Purpose.** The department of cultural affairs has primary responsibility for development of the state's interest in the areas of the arts, history, ~~libraries,~~ and other cultural matters. In fulfilling this responsibility, the department is advised and assisted by ~~the cultural affairs advisory council, the state library commission, the state historical society board of trustees, and the Iowa arts council, the Terrace Hill commission, and the Iowa public broadcasting board.~~ The department performs the functions enumerated in Iowa Code section 303.1.

ITEM 3. Amend rule 221—1.4(303) as follows:

**221—1.4(303) Director's duties.** The director performs duties as specified in Iowa Code section 303.1A ~~except for those matters prescribed by Iowa Code sections 303.75 to 303.83.~~

ITEM 4. Rescind rule 221—1.5(303).

ITEM 5. Amend rule 221—1.6(303) as follows:

**221—1.65(303) Divisions.**

**1.65(1) Arts division.** The arts division performs the duties enumerated in Iowa Code section 303.2(-4-3) and may perform other functions assigned to it by law or rule.

**1.65(2) Historical division.** The historical division performs the duties enumerated in Iowa Code section 303.2(2) and may perform other functions assigned to it by law or rule.

~~**1.6(3) Library division.** The library division performs the duties enumerated in Iowa Code section 303.2(3) and may perform other functions assigned to it by law or rule.~~

~~**1.6(4) Public broadcasting division.** The public broadcasting division performs duties enumerated in Iowa Code sections 303.75 to 303.83 and may perform other functions assigned to it by law or rule.~~

ITEM 6. Amend rule 221—1.7(303) as follows:

**221—1.76(303) Central Administrative offices and communications.** Correspondence and communications with the department and its divisions shall be directed as follows:

**1.76(1)** The department and its administrative services section *may be reached as follows:* Department of Cultural Affairs, Historical Building, ~~Capitol Complex 600 East Locust Street,~~ Des Moines, Iowa 50319, telephone (515) 281-6258/7471, fax (515)242-6498.

**1.76(2)** The arts division *may be reached as follows:* Iowa Arts Council, ~~Executive Hills, Capitol Complex Historical~~

CULTURAL AFFAIRS DEPARTMENT[221](cont'd)

Building, 600 East Locust Street, Des Moines, Iowa 50319, telephone (515)281-4451, fax (515)242-6498.

1.76(3) The historical division may be reached as follows: State Historical Society of Iowa, Historical Building, Capitol Complex 600 East Locust Street, Des Moines, Iowa 50319, telephone (515)281-3159/5111, fax (515)242-6498.

1.7(4) The library division: State Library of Iowa, East 12th and Grand Avenue, Des Moines, Iowa 50319, phone (515)281-4105.

1.7(5) The public broadcasting division: Iowa Public Television, 6450 Pioneer Parkway, Post Office Box 6540, Johnston, Iowa 50131, phone (515)281-4500.

ITEM 7. Adopt the following new chapter:

CHAPTER 3  
DECLARATORY ORDERS

221—3.1(17A) **Petition for declaratory order.** Any person may file a petition with the department for a declaratory order as to the applicability to specified circumstances of a statute, rule, or order within the primary jurisdiction of the department, at the Director's Office, Department of Cultural Affairs, 600 East Locust Street, Des Moines, Iowa 50319. A petition is deemed filed when it is received by that office. The department shall provide the petitioner with a file-stamped copy of the petition if the petitioner provides the department an extra copy for this purpose. The petition must be typewritten or legibly handwritten in ink and must substantially conform to the following form:

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DEPARTMENT OF CULTURAL AFFAIRS

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Petition by (Name of Petitioner) for a Declaratory Order on (Cite provisions of law involved).	}	PETITION FOR DECLARATORY ORDER
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The petition must provide the following information:

1. A clear and concise statement of all relevant facts on which the order is requested.
2. A citation and the relevant language of the specific statutes, rules, policies, decisions, or orders, whose applicability is questioned, and any other relevant law.
3. The questions petitioner wants answered, stated clearly and concisely.
4. The answers to the questions desired by the petitioner and a summary of the reasons urged by the petitioner in support of those answers.
5. The reasons for requesting the declaratory order and disclosure of the petitioner's interest in the outcome.
6. A statement indicating whether the petitioner is currently a party to another proceeding involving the questions at issue and whether, to the petitioner's knowledge, those questions have been decided by, are pending determination by, or are under investigation by, any governmental entity.
7. The names and addresses of other persons, or a description of any class of persons, known by the petitioner to be affected by, or interested in, the questions provided for by 221—3.7(17A).

The petition must be dated and signed by the petitioner or the petitioner's representative. It must also include the name, mailing address, and telephone number of the petitioner and petitioner's representative and a statement indicating the person to whom communications concerning the petition should be directed.

221—3.2(17A) **Notice of petition.** Within 15 days after receipt of a petition for a declaratory order, the department shall give notice of the petition to all persons not served by the petitioner pursuant to 3.6(17A) to whom notice is required by any provision of law. The department may also give notice to any other persons.

221—3.3(17A) **Intervention.**

3.3(1) Persons who qualify under any applicable provision of law as an intervenor and who file a petition for intervention within 20 days of the filing of a petition for declaratory order shall be allowed to intervene in a proceeding for a declaratory order.

3.3(2) Any person who files a petition for intervention at any time prior to the issuance of an order may be allowed to intervene in a proceeding for a declaratory order at the discretion of the department.

3.3(3) A petition for intervention shall be filed at the director's office. Such a petition is deemed filed when it is received by that office. The department will provide the petitioner with a file-stamped copy of the petition for intervention if the petitioner provides an extra copy for that purpose. A petition for intervention must be typewritten or legibly handwritten in ink and must substantially conform to the following form:

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DEPARTMENT OF CULTURAL AFFAIRS

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Petition by (Name of Original Petitioner) for a Declaratory Order on (Cite provisions of law cited in original petition).	}	PETITION FOR INTERVENTION
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The petition for intervention must provide the following information:

1. Facts supporting the intervenor's standing and qualifications for intervention.
2. The answers urged by the intervenor to the question or questions presented and a summary of the reasons urged in support of those answers.
3. Reasons for requesting intervention and disclosure of the intervenor's interest in the outcome.
4. A statement indicating whether the intervenor is currently a party to any proceeding involving the questions at issue and whether, to the intervenor's knowledge, those questions have been decided by, are pending determination by, or are under investigation by, any governmental entity.
5. The names and addresses of any additional persons, or a description of any additional class of persons, known by the intervenor to be affected by, or interested in, the questions presented.
6. Whether the intervenor consents to be bound by the determination of the matters presented in the declaratory order proceeding.

The petition must be dated and signed by the intervenor or the intervenor's representative. It must also include the name, mailing address, and telephone number of the intervenor and intervenor's representative, and a statement indicating the person to whom communications should be directed.

221—3.4(17A) **Briefs.** The petitioner or any intervenor may file a brief in support of the position urged. The department may request a brief from the petitioner, any intervenor, or any other person concerning the questions raised.

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**221—3.5(17A) Inquiries.** Inquiries concerning the status of a declaratory order proceeding may be made to the Director, Department of Cultural Affairs, 600 East Locust Street, Des Moines, Iowa 50319.

**221—3.6(17A) Service and filing of petitions and other papers.**

**3.6(1)** When service required. Except where otherwise provided by law, every petition for declaratory order, petition for intervention, brief, or other paper filed in a proceeding for a declaratory order shall be served upon each of the parties of record to the proceeding, and on all other persons identified in the petition for declaratory order or petition for intervention as affected by or interested in the questions presented, simultaneously with their filing. The party filing a document is responsible for service on all parties and other affected or interested persons.

**3.6(2)** Filing—when required. All petitions for declaratory orders, petitions for intervention, briefs, or other papers in a proceeding for a declaratory order shall be filed with the *Administrative Offices, Department of Cultural Affairs, 600 East Locust Street, Des Moines, Iowa 50319*. All documents are considered filed upon receipt.

**221—3.7(17A) Consideration.** Upon request by petitioner, the department must schedule a brief and informal meeting between the original petitioner, all intervenors, and a member of the staff of the department to discuss the questions raised. The department may solicit comments from any person on the questions raised. Also, comments on the questions raised may be submitted to the department by any person.

**221—3.8(17A) Action on petition.**

**3.8(1)** Time frame for action. Within the time allowed by 1998 Iowa Acts, chapter 1202, section 13(5), after receipt of a petition for a declaratory order, the director or designee shall take action on the petition as required by 1998 Iowa Acts, chapter 1202, section 13(5).

**3.8(2)** The date of issuance of an order or of a refusal to issue an order is the date of mailing of the order or refusal or the date of delivery if service is by other means unless another date is specified in the order.

**221—3.9(17A) Refusal to issue order.**

**3.9(1)** The department shall not issue a declaratory order where prohibited by 1998 Iowa Acts, chapter 1202, section 13(1), and may refuse to issue a declaratory order on some or all questions raised for the following reasons:

1. The petition does not substantially comply with the required form.

2. The petition does not contain facts sufficient to demonstrate that the petitioner will be aggrieved or adversely affected by the failure of the department to issue an order.

3. The department does not have jurisdiction over the questions presented in the petition.

4. The questions presented by the petition are also presented in a current rule making, contested case, or other department or judicial proceeding, that may definitively resolve them.

5. The questions presented by the petition would more properly be resolved in a different type of proceeding or by another body with jurisdiction over the matter.

6. The facts or questions presented in the petition are unclear, overbroad, insufficient, or otherwise inappropriate as a basis upon which to issue an order.

7. There is no need to issue an order because the questions raised in the petition have been settled due to a change in circumstances.

8. The petition is not based upon facts calculated to aid in the planning of future conduct but is, instead, based solely upon prior conduct in an effort to establish the effect of that conduct or to challenge a department decision already made.

9. The petition requests a declaratory order that would necessarily determine the legal rights, duties, or responsibilities of other persons who have not joined in the petition, intervened separately, or filed a similar petition and whose position on the questions presented may fairly be presumed to be adverse to that of petitioner.

10. The petitioner requests the department to determine whether a statute is unconstitutional on its face.

**3.9(2)** A refusal to issue a declaratory order must indicate the specific grounds for the refusal and constitutes final department action on the petition.

**3.9(3)** Refusal to issue a declaratory order pursuant to this provision does not preclude the filing of a new petition that seeks to eliminate the grounds for the refusal to issue an order.

**221—3.10(17A) Contents of declaratory order—effective date.** In addition to the order itself, a declaratory order must contain the date of its issuance, the name of petitioner and all intervenors, the specific statutes, rules, policies, decisions, or orders involved, the particular facts upon which it is based, and the reasons for its conclusion. A declaratory order is effective on the date of issuance.

**221—3.11(17A) Copies of orders.** A copy of all orders issued in response to a petition for a declaratory order shall be mailed promptly to the original petitioner and all intervenors.

**221—3.12(17A) Effect of declaratory order.** A declaratory order has the same status and binding effect as a final order issued in a contested case proceeding. It is binding on the department, the petitioner, and any intervenors who consent to be bound and is applicable only in circumstances where the relevant facts and the law involved are indistinguishable from those on which the order was based. As to all other persons, a declaratory ruling serves only as precedent and is not binding on the department. The issuance of a declaratory order constitutes final department action on the petition.

These rules are intended to implement Iowa Code section 17A.9 as amended by 1998 Iowa Acts, chapter 1202, section 13.

ITEM 8. Adopt the following new chapter:

CHAPTER 4

DEPARTMENT PROCEDURE FOR RULE MAKING

**221—4.1(17A) Applicability.** Except to the extent otherwise expressly provided by statute, all rules adopted by the department are subject to the provisions of Iowa Code chapter 17A, the Iowa administrative procedure Act, and the provisions of this chapter.

**221—4.2(17A) Advice on possible rules before notice of proposed rule adoption.** In addition to seeking information by other methods, the department may, before publication of a Notice of Intended Action under Iowa Code section 17A.4(1)"a," solicit comments from the public on a subject matter of possible rule making by the department by causing notice to be published in the Iowa Administrative Bulletin of the subject matter and indicating where, when, and how persons may comment.

**221—4.3(17A) Public rule-making docket.**

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**4.3(1)** Docket maintained. The department shall maintain a current public rule-making docket.

**4.3(2)** Anticipated rule making. The rule-making docket shall list each anticipated rule-making proceeding. A rule-making proceeding is deemed "anticipated" from the time a draft of proposed rules is distributed for internal discussion within the department. For each anticipated rule-making proceeding the docket shall contain a listing of the precise subject matter which may be submitted for consideration by the director for subsequent proposal under the provisions of Iowa Code section 17A.4(1)"a," the name and address of department personnel with whom persons may communicate with respect to the matter, and an indication of the present status within the department of that possible rule. The department may also include in the docket other subjects upon which public comment is desired.

**4.3(3)** Pending rule-making proceedings. The rule-making docket shall list each pending rule-making proceeding. A rule-making proceeding is pending from the time it is commenced, by publication in the Iowa Administrative Bulletin of a Notice of Intended Action pursuant to Iowa Code section 17A.4(1)"a," to the time it is terminated, by publication of a Notice of Termination in the Iowa Administrative Bulletin or the rule becoming effective. For each rule-making proceeding, the docket shall indicate:

- a. The subject matter of the proposed rule;
- b. A citation to all published notices relating to the proceeding;
- c. Where written submissions on the proposed rule may be inspected;
- d. The time during which written submissions may be made;
- e. The names of persons who have made written requests for an opportunity to make oral presentations on the proposed rule, where those requests may be inspected, and where and when oral presentations may be made;
- f. Whether a written request for the issuance of a regulatory analysis, or a concise statement of reasons, has been filed, whether such an analysis or statement or a fiscal impact statement has been issued, and where any such written request, analysis, or statement may be inspected;
- g. The current status of the proposed rule and any determinations with respect thereto;
- h. Any known timetable for department decisions or other action in the proceeding;
- i. The date of the rule's adoption;
- j. The date of the rule's filing, indexing, and publication;
- k. The date on which the rule will become effective; and
- l. Where the rule-making record may be inspected.

**221—4.4(17A) Notice of proposed rule making.**

**4.4(1)** Contents. At least 35 days before the adoption of a rule the department shall cause Notice of Intended Action to be published in the Iowa Administrative Bulletin. The Notice of Intended Action shall include:

- a. A brief explanation of the purpose of the proposed rule;
- b. The specific legal authority for the proposed rule;
- c. Except to the extent impracticable, the text of the proposed rule;
- d. Where, when, and how persons may present their views on the proposed rule; and
- e. Where, when, and how persons may demand an oral proceeding on the proposed rule if the notice does not already provide for one.

Where inclusion of the complete text of a proposed rule in the Notice of Intended Action is impracticable, the department shall include in the notice a statement fully describing the specific subject matter of the omitted portion of the text of the proposed rule, the specific issues to be addressed by that omitted text of the proposed rule, and the range of possible choices being considered by the department for the resolution of each of those issues.

**4.4(2)** Incorporation by reference. A proposed rule may incorporate other materials by reference only if it complies with all of the requirements applicable to the incorporation by reference of other materials in an adopted rule that are contained in subrule 4.12(2) of this chapter.

**4.4(3)** Copies of notices. Persons desiring to receive copies of future Notices of Intended Action by subscription must file with the department a written request indicating the name and address to which such notices should be sent. Within seven days after submission of a Notice of Intended Action to the administrative rules coordinator for publication in the Iowa Administrative Bulletin, the department shall mail or electronically transmit a copy of that notice to subscribers who have filed a written request for either mailing or electronic transmittal with the department for Notices of Intended Action. The written request shall be accompanied by payment of the subscription price which may cover the full cost of the subscription service, including its administrative overhead and the cost of copying and mailing the Notices of Intended Action for a period of one year.

**221—4.5(17A) Public participation.**

**4.5(1)** Written comments. For at least 20 days after publication of the Notice of Intended Action, persons may submit argument, data, and views, in writing, on the proposed rule. Such written submissions should identify the proposed rule to which they relate and should be submitted to the Director, Department of Cultural Affairs, 600 East Locust Street, Des Moines, Iowa 50319, or the person designated in the Notice of Intended Action.

**4.5(2)** Oral proceedings. The department may, at any time, schedule an oral proceeding on a proposed rule. The department shall schedule an oral proceeding on a proposed rule if, within 20 days after the published Notice of Intended Action, a written request for an opportunity to make oral presentations is submitted to the department by the administrative rules review committee, a governmental subdivision, an agency, an association having not less than 25 members, or at least 25 persons. That request must also contain the following additional information:

1. A request by one or more individual persons must be signed by each of them and include the address and telephone number of each of them.
2. A request by an association must be signed by an officer or designee of the association and must contain a statement that the association has at least 25 members and the address and telephone number of the person signing that request.
3. A request by an agency or governmental subdivision must be signed by an official having authority to act on behalf of the entity and must contain the address and telephone number of the person signing that request.

**4.5(3)** Conduct of oral proceedings.

a. Applicability. This subrule applies only to those oral rule-making proceedings in which an opportunity to make oral presentations is authorized or required by Iowa Code section 17A.4(1)"b" as amended by 1998 Iowa Acts, chapter 1202, section 8, or this chapter.

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b. **Scheduling and notice.** An oral proceeding on a proposed rule may be held in one or more locations and shall not be held earlier than 20 days after notice of its location and time is published in the Iowa Administrative Bulletin.

c. **Presiding officer.** The department, a member of the department, or another person designated by the department who will be familiar with the substance of the proposed rule, shall preside at the oral proceeding on a proposed rule. If the department does not preside, the presiding officer shall prepare a memorandum for consideration by the department summarizing the contents of the presentations made at the oral proceeding unless the department determines that such a memorandum is unnecessary because the department will personally listen to or read the entire transcript of the oral proceeding.

d. **Conduct of proceeding.** At an oral proceeding on a proposed rule, persons may make oral statements and make documentary and physical submissions, which may include date, views, comments or arguments concerning the proposed rule. Persons wishing to make oral presentations at such a proceeding are encouraged to notify the department at least one business day prior to the proceeding and indicate the general subject of their presentations. At the proceeding, those who participate shall indicate their names and addresses, identify any persons or organizations they may represent, and provide any other information relating to their participation deemed appropriate by the presiding officer. Oral proceedings shall be open to the public and shall be recorded by stenographic or electronic means.

(1) At the beginning of the oral proceeding, the presiding officer shall give a brief synopsis of the proposed rule, a statement of the statutory authority for the proposed rule, and the reasons for the department decision to propose the rule. The presiding officer may place time limitations on individual oral presentations when necessary to ensure the orderly and expeditious conduct of the oral proceeding. To encourage joint oral presentations and to avoid repetition, additional time may be provided for persons whose presentations represent the views of other individuals as well as their own views.

(2) Persons making oral presentations are encouraged to avoid restating matters which have already been submitted in writing.

(3) To facilitate the exchange of information, the presiding officer may, where time permits, open the floor to questions or general discussion.

(4) The presiding officer shall have the authority to take any reasonable action necessary for the orderly conduct of the meeting.

(5) Physical and documentary submissions presented by participants in the oral proceeding shall be submitted to the presiding officer. Such submissions become the property of the department.

(6) The oral proceeding may be continued by the presiding officer to a later time without notice other than by announcement at the hearing.

(7) Participants in an oral proceeding shall not be required to take an oath or to submit to cross-examination. However, the presiding officer in an oral proceeding may question participants and permit the questioning of participants by other participants about any matter relating to that rule-making proceeding, including any prior written submissions made by those participants in that proceeding; but no participant shall be required to answer any question.

(8) The presiding officer in an oral proceeding may permit rebuttal statements and request the filing of written state-

ments subsequent to the adjournment of the oral presentations.

**4.5(4) Additional information.** In addition to receiving written comments and oral presentations on a proposed rule according to the provisions of this rule, the department may obtain information concerning a proposed rule through any other lawful means deemed appropriate under the circumstances.

**4.5(5) Accessibility.** The department shall schedule oral proceedings in rooms accessible to and functional for persons with disabilities. Persons who have special requirements should contact: Director's Office, Department of Cultural Affairs, 600 East Locust Street, Des Moines, Iowa 50319, telephone (515)281-7471, or fax (515)242-6498 in advance to arrange access or other needed services.

**221—4.6(17A) Regulatory analysis.**

**4.6(1) Definition of small business.** A "small business" is defined in 1998 Iowa Acts, chapter 1202, section 10(7).

**4.6(2) Mailing list.** Small businesses or organizations of small businesses may be registered on the department's small business impact list by making a written application addressed to the director.

The application for registration shall state:

a. The name of the small business or organization of small businesses;

b. Its address;

c. The name of a person authorized to transact business for the applicant;

d. A description of the applicant's business or organization. An organization representing 25 or more persons who qualify as a small business shall indicate that fact.

e. Whether the registrant desires copies of Notices of Intended Action at cost, or desires advance notice of the subject of all or some specific category of proposed rule making affecting small business.

The department may at any time request additional information from the applicant to determine whether the applicant is qualified as a small business or as an organization of 25 or more small businesses. The department may periodically send a letter to each registered small business or organization of small businesses asking whether that business or organization wishes to remain on the registration list. The name of a small business or organization of small businesses will be removed from the list if a negative response is received, or if no response is received within 30 days after the letter is sent.

**4.6(3) Time of mailing.** Within seven days after submission of a Notice of Intended Action to the administrative rules coordinator for publication in the Iowa Administrative Bulletin, the department shall mail to all registered small businesses or organizations of small businesses, in accordance with their request, either a copy of the Notice of Intended Action or notice of the subject of that proposed rule making. In the case of a rule that may have an impact on small business adopted in reliance upon Iowa Code section 17A.4(2), the department shall mail notice of the adopted rule to registered businesses or organizations prior to the time the adopted rule is published in the Iowa Administrative Bulletin.

**4.6(4) Qualified requesters for regulatory analysis—economic impact.** The department shall issue a regulatory analysis of a proposed rule that conforms to the requirements of 1998 Iowa Acts, chapter 1202, section 10(2a) after a proper request from:

a. The administrative rules coordinator; or

b. The administrative rules review committee.

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**4.6(5)** Qualified requesters for regulatory analysis—business impact. The department shall issue a regulatory analysis of a proposed rule that conforms to the requirements of 1998 Iowa Acts, chapter 1202, section 10(2b), after a proper request from:

- a. The administrative rules review committee;
- b. The administrative rules coordinator;
- c. At least 25 or more persons who sign the request provided that each represents a different small business; or
- d. An organization representing at least 25 small businesses. That organization shall list the name, address and telephone number of not less than 25 small businesses it represents.

**4.6(6)** Time period for analysis. Upon receipt of a timely request for a regulatory analysis the department shall adhere to the time lines described in 1998 Iowa Acts, chapter 1202, section 10(4).

**4.6(7)** Contents of request. A request for a regulatory analysis is made when it is mailed or delivered to the department. The request shall be in writing and satisfy the requirements of 1998 Iowa Acts, chapter 1202, section 10(1).

**4.6(8)** Contents of concise summary. The contents of the concise summary shall conform to the requirements of 1998 Iowa Acts, chapter 1202, section 10(4,5).

**4.6(9)** Publication of a concise summary. The department shall make available, to the maximum extent feasible, copies of the published summary in conformance with 1998 Iowa Acts, chapter 1202, section 10(5).

**4.6(10)** Regulatory analysis contents—rules review committee or rules coordinator. When a regulatory analysis is issued in response to a written request from the administrative rules review committee, or the administrative rules coordinator, the regulatory analysis shall conform to the requirements of 1998 Iowa Acts, chapter 1202, section 10(12a), unless a written request expressly waives one or more of the items listed in the section.

**4.6(11)** Regulatory analysis contents—substantial impact on small business. When a regulatory analysis is issued in response to a written request from the administrative rules review committee, the administrative rules coordinator, at least 25 persons signing that request who each qualify as a small business or by an organization representing at least 25 small businesses, the regulatory analysis shall conform to the requirements of 1998 Iowa Acts, chapter 1202, section 10(2b).

**221—4.7(17A, 25B) Fiscal impact statement.**

**4.7(1)** A proposed rule that mandates additional combined expenditures exceeding \$100,000 by all affected political subdivisions or agencies and entities which contract with political subdivisions to provide services must be accompanied by a fiscal impact statement outlining the costs associated with the rule. A fiscal impact statement must satisfy the requirements of Iowa Code section 25B.6.

**4.7(2)** If the department determines at the time it adopts a rule that the fiscal impact statement upon which the rule is based contains errors, the department shall, at the same time, issue a corrected fiscal impact statement and publish the corrected fiscal impact statement in the Iowa Administrative Bulletin.

**221—4.8(17A) Time and manner of rule adoption.**

**4.8(1)** Time of adoption. The department shall not adopt a rule until the period for making written submissions and oral presentations has expired. Within 180 days after the later of the publication of the Notice of Intended Action, or the end of the oral proceedings thereon, the department shall adopt a rule pursuant to the rule-making proceeding or termi-

nate the proceeding by publication of a notice to that effect in the Iowa Administrative Bulletin.

**4.8(2)** Consideration of public comment. Before the adoption of a rule, the department shall consider fully all of the written submissions and oral submissions received in that rule-making proceeding, or any memorandum summarizing such oral submissions, and any regulatory analysis or fiscal impact statement issued in that rule-making proceeding.

**4.8(3)** Reliance on department expertise. Except as otherwise provided by law, the department may use its own experience, technical competence, specialized knowledge, and judgment in the adoption of a rule.

**221—4.9(17A) Variance between adopted rule and published notice of proposed rule adoption.**

**4.9(1)** The department shall not adopt a rule that differs from the rule proposed in the Notice of Intended Action on which the rule is based unless:

a. The differences are within the scope of the subject matter announced in the Notice of Intended Action and are in character with the issues raised in that notice; and

b. The differences are a logical outgrowth of the contents of that Notice of Intended Action and the comments submitted in response thereto; and

c. The Notice of Intended Action provided fair warning that the outcome of that rule-making proceeding could be the rule in question.

**4.9(2)** In determining whether the Notice of Intended Action provided fair warning that the outcome of that rule-making proceeding could be the rule in question, the department shall consider the following factors:

a. The extent to which persons who will be affected by the rule should have understood that the rule-making proceeding on which it is based could affect their interests;

b. The extent to which the subject matter of the rule or the issues determined by the rule are different from the subject matter or issues contained in the Notice of Intended Action; and

c. The extent to which the effects of the rule differ from the effects of the proposed rule contained in the Notice of Intended Action.

**4.9(3)** The department shall commence a rule-making proceeding within 60 days of its receipt of a petition for rule making seeking the amendment or repeal of a rule that differs from the proposed rule contained in the Notice of Intended Action upon which the rule is based, unless the department finds that the differences between the adopted rule and the proposed rule are so insubstantial as to make such a rule-making proceeding wholly unnecessary. A copy of any such finding and the petition to which it responds shall be sent to petitioner, the administrative rules coordinator, and the administrative rules review committee, within three days of its issuance.

**4.9(4)** Concurrent rule-making proceedings. Nothing in this rule disturbs the discretion of the department to initiate, concurrently, several different rule-making proceedings on the same subject with several different published Notices of Intended Action.

**221—4.10(17A) Exemptions from public rule-making procedures.**

**4.10(1)** Omission of notice and comment. To the extent the department for good cause finds that public notice and participation are unnecessary, impracticable, or contrary to the public interest in the process of adopting a particular rule, the department may adopt that rule without publishing advance Notice of Intended Action in the Iowa Administrative Bulletin and without providing for written or oral public sub-

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missions prior to its adoption. The department shall incorporate the required finding and a brief statement of its supporting reasons in each rule adopted in reliance upon this subrule.

**4.10(2)** Categories exempt. The following narrowly tailored categories of rules are exempted from the usual public notice and participation requirements because those requirements are unnecessary, impracticable, or contrary to the public interest with respect to each and every member of the defined class:

Rules that are mandated by federal law or regulations are exempted from the usual public notice and participation requirements in any situation where the department has no option but to adopt specified rules or where federal funding is contingent upon the adoption of the rules. Notice and public participation would be unnecessary since the provisions of the law or regulation must be adopted in order to maintain federal funding and the department would have no option in the rule which was adopted.

**4.10(3)** Public proceedings on rules adopted without them. The department may, at any time, commence a standard rule-making proceeding for the adoption of a rule that is identical or similar to a rule it adopts in reliance upon subrule 4.10(1). Upon written petition by a governmental subdivision, the administrative rules review committee, a department or agency, the administrative rules coordinator, an association having not less than 25 members, or at least 25 persons, the department shall commence a standard rule-making proceeding for any rule specified in the petition that was adopted in reliance upon subrule 4.10(1). Such a petition must be filed within one year of the publication of the specified rule in the Iowa Administrative Bulletin as an adopted rule. The rule-making proceeding on that rule must be commenced within 60 days of the receipt of such a petition. After a standard rule-making proceeding commenced pursuant to this subrule, the department may either readopt the rule it adopted without benefit of all usual procedures on the basis of subrule 4.10(1), or may take any other lawful action, including the amendment or repeal of the rule in question, with whatever further proceedings are appropriate.

**221—4.11(17A) Concise statement of reasons.**

**4.11(1)** General. When requested by a person, either prior to the adoption of a rule or within 30 days after its publication in the Iowa Administrative Bulletin as an adopted rule, the department shall issue a concise statement of reasons for the rule. Requests for such a statement must be in writing and be delivered to the Director, Department of Cultural Affairs, 600 East Locust Street, Des Moines, Iowa 50319. The request should indicate whether the statement is sought for all or only a specified part of the rule. Requests will be considered made on the date received.

**4.11(2)** Contents. The concise statement of reasons shall contain:

- a. The reasons for adopting the rule;
- b. An indication of any change between the text of the proposed rule contained in the published Notice of Intended Action and the text of the rule as finally adopted, with the reasons for any such change;
- c. The principal reasons urged in the rule-making proceeding for and against the rule, and the department's reasons for overruling the arguments made against the rule.

**4.11(3)** Time of issuance. After a proper request, the department shall issue a concise statement of reasons by the later of the time the rule is adopted or 35 days after receipt of the request.

**221—4.12(17A) Contents, style, and form of rule.**

**4.12(1)** Contents. Each rule adopted by the department shall contain the text of the rule and, in addition:

- a. The date the department adopted the rule;
- b. A brief explanation of the principal reasons for the rule-making action if such reasons are required by 1998 Iowa Acts, chapter 1202, section 8, or the department in its discretion decides to include such reasons;
- c. A reference to all rules repealed, amended, or suspended by rule;
- d. A reference to the specific statutory or other authority authorizing adoption of the rule;
- e. Any findings required by any provision of law as a prerequisite to adoption or effectiveness of the rule;
- f. A brief explanation of the principal reasons for the failure to provide for waivers to the rule if no waiver provision is included and a brief explanation of any waiver or special exception provided in the rule if such reasons are required by 1998 Iowa Acts, chapter 1202, section 8, or the department in its discretion decides to include such reasons; and
- g. The effective date of the rule.

**4.12(2)** Incorporation by reference. The department may incorporate by reference in a proposed or adopted rule, and without causing publication of the incorporated matter in full, all or any part of a code, standard, rule, or other matter if the department finds that the incorporation of its text in the department proposed or adopted rule would be unduly cumbersome, expensive, or otherwise inexpedient. The reference in the department proposed or adopted rule shall fully and precisely identify the incorporated matter by location, title, citation, date, and edition, if any; shall briefly indicate the precise subject and the general contents of the incorporated matter; and shall state that the proposed or adopted rule does not include any later amendments or editions of the incorporated matter. The department may incorporate such matter by reference in a proposed or adopted rule only if the department makes copies of it readily available to the public. The rule shall state how and where copies of the incorporated matter may be obtained at cost from the department, and how and where copies may be obtained from the agency of the United States, this state, another state, or the organization, association, or persons, originally issuing that matter. The department shall retain permanently a copy of any materials incorporated by reference in a rule of the department.

If the department adopts standards by reference to another publication, it shall provide a copy of the publication containing the standards to the administrative rules coordinator for deposit in the state law library and may make the standards available electronically.

**4.12(3)** References to materials not published in full. When the administrative code editor decides to omit the full text of a proposed or adopted rule because publication of the full text would be unduly cumbersome, expensive, or otherwise inexpedient, the department shall prepare and submit to the administrative code editor for inclusion in the Iowa Administrative Bulletin and Iowa Administrative Code a summary statement describing the specific subject matter of the omitted material. This summary statement shall include the title and a brief description sufficient to inform the public of the specific nature and subject matter of the proposed or adopted rules, and of significant issues involved in these rules. The summary statement shall also describe how a copy of the full text of the proposed or adopted rule, including any unpublished matter and any matter incorporated by reference, may be obtained from the department. The de-

## CULTURAL AFFAIRS DEPARTMENT[221](cont'd)

partment will provide a copy of that full text (at actual cost) upon request and shall make copies of the full text available for review at the state law library and may make the standards available electronically.

At the request of the administrative code editor, the department shall provide a proposed statement explaining why publication of the full text would be unduly cumbersome, expensive, or otherwise inexpedient.

**4.12(4) Style and form.** In preparing its rules, the department shall follow the uniform numbering system, form, and style prescribed by the administrative rules coordinator.

**221—4.13(17A) Department rule-making record.**

**4.13(1) Requirement.** The department shall maintain an official rule-making record for each rule it proposes by publication in the Iowa Administrative Bulletin of a Notice of Intended Action, or adopts. The rule-making record and materials incorporated by reference must be available for public inspection.

**4.13(2) Contents.** The department rule-making record shall contain:

a. Copies of all publications in the Iowa Administrative Bulletin with respect to the rule or the proceeding upon which the rule is based and any file-stamped copies of departmental submissions to the administrative rules coordinator concerning that rule or the proceeding upon which it is based;

b. Copies of any portions of the department's public rule-making docket containing entries relating to the rule or the proceeding upon which the rule is based;

c. All written petitions, requests, and submissions received by the department, and all other written materials of a factual nature as distinguished from opinion that are relevant to the merits of the rule and that were created or compiled by the department and considered by the director, in connection with the formulation, proposal, or adoption of the rule or the proceeding upon which the rule is based, except to the extent the department is authorized by law to keep them confidential; provided, however, that when any such materials are deleted because they are authorized by law to be kept confidential, the department shall identify in the record the particular materials deleted and state the reasons for that deletion;

d. Any official transcript of oral presentations made in the proceeding upon which the rule is based or, if not transcribed, the stenographic record or electronic recording of those presentations, and any memorandum prepared by a presiding officer summarizing the contents of those presentations;

e. A copy of any regulatory analysis or fiscal impact statement prepared for the proceeding upon which the rule is based;

f. A copy of the rule and any concise statement of reasons prepared for that rule;

g. All petitions for amendment or repeal or suspension of the rule;

h. A copy of any objection to the issuance of that rule without public notice and participation that was filed pursuant to Iowa Code section 17A.4(2) by the administrative rules review committee, the governor, or the attorney general;

i. A copy of any objection to the rule filed by the administrative rules review committee, the governor, or the attorney general pursuant to Iowa Code section 17A.4(4), and any department response to that objection;

j. A copy of any significant written criticism of the rule, including a summary of any petitions for waiver of the rule; and

k. A copy of any executive order concerning the rule.

**4.13(4) Maintenance of record.** The department shall maintain the rule-making record for a period of not less than five years from the later of the date the rule to which it pertains became effective, the date of the Notice of Intended Action, or the date of any written criticism as described in 4.13(2) "g," "h," "i," or "j."

**221—4.14(17A) Filing of rules.** The department shall file each rule it adopts in the office of the administrative rules coordinator. The filing must be executed as soon after adoption of the rule as is practicable. At the time of filing, each rule must have attached to it any fiscal impact statement and any concise statement of reasons that was issued with respect to that rule. If a fiscal impact statement or statement of reasons for that rule was not issued until a time subsequent to the filing of that rule, the note or statement must be attached to the filed rule within five working days after the note or statement is issued. In filing a rule, the department shall use the standard form prescribed by the administrative rules coordinator.

**221—4.15(17A) Effectiveness of rules prior to publication.**

**4.15(1) Grounds.** The department may make a rule effective after its filing at any stated time prior to 35 days after its indexing and publication in the Iowa Administrative Bulletin if it finds that a statute so provides, the rule confers a benefit or removes a restriction on some segment of the public, or that the effective date of the rule is necessary to avoid imminent peril to the public health, safety, or welfare. The department shall incorporate the required finding and a brief statement of its supporting reasons in each rule adopted in reliance upon this subrule.

**4.15(2) Special notice.** When the department makes a rule effective prior to its indexing and publication in reliance upon the provisions of Iowa Code section 17A.5(2)"b"(3), the department shall employ all reasonable efforts to make its contents known to the persons who may be affected by that rule to the rule's indexing and publication. The term "all reasonable efforts" requires the department to employ the most effective and prompt means of notice rationally calculated to inform potentially affected parties of the effectiveness of the rule that is justified and practical under the circumstances considering the various alternatives available for this purpose, the comparative costs to the department of utilizing each of those alternatives, and the harm suffered by affected persons from any lack of notice concerning the contents of the rule prior to its indexing and publication. The means that may be used for providing notice of such rules prior to their indexing and publication include, but are not limited to, any one or more of the following means: radio, newspaper, television, signs, mail, telephone, personal notice or electronic means.

A rule made effective prior to its indexing and publication in reliance upon the provisions of Iowa Code section 17A.5(2)"b"(3) shall include in that rule a statement describing the reasonable efforts that will be used to comply with the requirements of subrule 4.15(2).

**221—4.16(17A) General statements of policy.**

**4.16(1) Compilation, indexing, public inspection.** The department shall maintain an official, current, and dated compilation that is indexed by subject, containing all of its general statements of policy within the scope of Iowa Code section 17A.2(10) "a," "c," "f," "g," "h," "k." Each addition to, change in, or deletion from the official compilation must also be dated, indexed, and a record thereof kept. Except for

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those portions containing rules governed by Iowa Code section 17A.2(7)"f," or otherwise authorized by law to be kept confidential, the compilation must be made available for public inspection and copying.

4.16(2) Enforcement of requirements. A general statement of policy subject to the requirements of this subsection shall not be relied on by the department to the detriment of any person who does not have actual, timely knowledge of the contents of the statement until the requirements of subrule 4.16(1) are satisfied. This provision is inapplicable to the extent necessary to avoid imminent peril to the public health, safety, or welfare.

221—4.17(17A) Review by department of rules.

4.17(1) Any interested person, association, agency, or political subdivision may submit a written request to the administrative rules coordinator requesting the department to conduct a formal review of a specified rule. Upon approval of that request by the administrative rules coordinator, the department shall conduct a formal review of a specified rule to determine whether a new rule should be adopted instead or the rule should be amended or repealed. The department may refuse to conduct review if it has conducted such a review of the specified rule within five years prior to the filing of the written request.

4.17(2) In conducting the formal review, the department shall prepare within a reasonable time a written report summarizing its findings, its supporting reasons, and any proposed course of action. The report must include a concise statement of the department's findings regarding the rule's effectiveness in achieving its objectives, including a summary of any available supporting data. The report shall also concisely describe significant written criticisms of the rule received during the previous five years, including a summary of any petitions for waiver of the rule received by the department or granted by the department. The report shall describe alternative solutions to resolve the criticisms of the rule, the reasons any were rejected, and any changes made in the rule in response to the criticisms as well as the reasons for the changes. A copy of the department's report shall be sent to the administrative rules review committee and the administrative rules coordinator. The report must also be available for public inspection.

These rules are intended to implement Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202, and Iowa Code section 25B.6.

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DENTAL EXAMINERS BOARD[650]

Notice of Intended Action

Twenty-five interested persons, a governmental subdivision, an agency or association of 25 or more persons may demand an oral presentation hereon as provided in Iowa Code section 17A.4(1)"b."

Notice is also given to the public that the Administrative Rules Review Committee may, on its own motion or on written request by any individual or group, review this proposed action under section 17A.8(6) at a regular or special meeting where the public or interested persons may be heard.

Pursuant to the authority of Iowa Code section 147.76, the Board of Dental Examiners gives Notice of Intended Action to amend Chapter 7, "Rules," and adopt Chapter 9, "Declaratory Orders," Iowa Administrative Code.

These amendments implement 1998 Iowa acts, chapter 1202 [House File 667], which amends the Iowa Administrative Procedure Act.

Any interested person may make written suggestions or comments on these proposed amendments on or before April 13, 1999. Such written comments should be directed to Constance L. Price, Executive Director, Board of Dental Examiners, Executive Hills West, 1209 East Court Avenue, Des Moines, Iowa 50319.

There will be a public hearing on April 21, 1999, at 1 p.m. in the Second Floor Conference Room, Executive Hills West, 1209 East Court Avenue, Des Moines, Iowa. At the hearing, persons will be asked to give their names and addresses for the record and to confine their remarks to the subject of the amendments.

These proposed amendments are intended to implement Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202 [House File 667].

The following amendments are proposed.

ITEM 1. Rescind rule 650—7.3(153).

ITEM 2. Adopt the following new chapter:

CHAPTER 9  
DECLARATORY ORDERS

650—9.1(17A) Petition for declaratory order. Any person may file a petition with the board (which for purposes of this chapter means the board of dental examiners or as to matters exclusively involving dental hygiene or dental hygienists means the dental hygiene committee of the board of dental examiners) for a declaratory order as to the applicability to specified circumstances of a statute, rule, or order within the primary jurisdiction of the Board of Dental Examiners, Executive Hills West, 1209 East Court, Des Moines, Iowa 50319. A petition is deemed filed when it is received by that office. The board of dental examiners shall provide the petitioner with a file-stamped copy of the petition if the petitioner provides the board an extra copy for this purpose. The petition must be typewritten or legibly handwritten in ink and must substantially conform to the following form:

BOARD OF DENTAL EXAMINERS

Petition by (Name of Petitioner) for a Declaratory Order on (Cite provisions of law involved).	}	PETITION FOR DECLARATORY ORDER
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The petition must provide the following information:

1. A clear and concise statement of all relevant facts on which the order is requested.
2. A citation and the relevant language of the specific statutes, rules, policies, decisions, or orders, whose applicability is questioned, and any other relevant law.
3. The questions petitioner wants answered, stated clearly and concisely.
4. The answers to the questions desired by the petitioner and a summary of the reasons urged by the petitioner in support of those answers.
5. The reasons for requesting the declaratory order and disclosure of the petitioner's interest in the outcome.
6. A statement indicating whether the petitioner is currently a party to another proceeding involving the questions at issue and whether, to the petitioner's knowledge, those

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questions have been decided by, are pending determination by, or are under investigation by, any governmental entity.

7. The names and addresses of other persons, or a description of any class of persons, known by petitioner to be affected by, or interested in, the questions presented in the petition.

8. Any request by petitioner for a meeting provided for by 650—9.7(17A).

The petition must be dated and signed by the petitioner or the petitioner's representative. It must also include the name, mailing address, and telephone number of the petitioner and petitioner's representative, and a statement indicating the person to whom communications concerning the petition should be directed.

**650—9.2(17A) Notice of petition.** Within 15 days after receipt of a petition for a declaratory order, the board of dental examiners shall give notice of the petition to all persons not served by the petitioner pursuant to 650—9.6(17A) to whom notice is required by any provision of law. The board of dental examiners may also give notice to any other persons.

**650—9.3(17A) Intervention.**

**9.3(1)** Persons who qualify under any applicable provision of law as an intervenor and who file a petition for intervention within 15 days of the filing of a petition for declaratory order shall be allowed to intervene in a proceeding for a declaratory order.

**9.3(2)** Any person who files a petition for intervention at any time prior to the issuance of an order may be allowed to intervene in a proceeding for a declaratory order at the discretion of the board of dental examiners.

**9.3(3)** A petition for intervention shall be filed at Executive Hills West, 1209 East Court, Des Moines, Iowa 50319. Such a petition is deemed filed when it is received by that office. The board of dental examiners will provide the petitioner with a file-stamped copy of the petition for intervention if the petitioner provides an extra copy for this purpose. A petition for intervention must be typewritten or legibly handwritten in ink and must substantially conform to the following form:

**BOARD OF DENTAL EXAMINERS**

Petition by (Name of Original Petitioner) for a Declaratory Order on (Cite provisions of law cited in original petition).



**PETITION FOR INTERVENTION**

The petition for intervention must provide the following information:

1. Facts supporting the intervenor's standing and qualifications for intervention.
2. The answers urged by the intervenor to the question or questions presented and a summary of the reasons urged in support of those answers.
3. Reasons for requesting intervention and disclosure of the intervenor's interest in the outcome.
4. A statement indicating whether the intervenor is currently a party to any proceeding involving the questions at issue and whether, to the intervenor's knowledge, those questions have been decided by, are pending determination by, or are under investigation by, any governmental entity.
5. The names and addresses of any additional persons, or a description of any additional class of persons, known by

the intervenor to be affected by, or interested in, the questions presented.

6. Whether the intervenor consents to be bound by the determination of the matters presented in the declaratory order proceeding.

The petition must be dated and signed by the intervenor or the intervenor's representative. It must also include the name, mailing address, and telephone number of the intervenor and intervenor's representative, and a statement indicating the person to whom communications should be directed.

**650—9.4(17A) Briefs.** The petitioner or any intervenor may file a brief in support of the position urged. The board of dental examiners may request a brief from the petitioner, any intervenor, or any other person concerning the questions raised.

**650—9.5(17A) Inquiries.** Inquiries concerning the status of a declaratory order proceeding may be made to the Executive Director, Board of Dental Examiners, Executive Hills West, 1209 East Court, Des Moines, Iowa 50319.

**650—9.6(17A) Service and filing of petitions and other papers.**

**9.6(1)** When service required. Except where otherwise provided by law, every petition for declaratory order, petition for intervention, brief, or other paper filed in a proceeding for a declaratory order shall be served upon each of the parties of record to the proceeding, and on all other persons identified in the petition for declaratory order or petition for intervention as affected by or interested in the questions presented, simultaneously with their filing. The party filing a document is responsible for service on all parties and other affected or interested persons.

**9.6(2)** Filing—when required. All petitions for declaratory orders, petitions for intervention, briefs, or other papers in a proceeding for a declaratory order shall be filed with the Board of Dental Examiners, Executive Hills West, 1209 East Court, Des Moines, Iowa 50319. All petitions, briefs, or other papers that are required to be served upon a party shall be filed simultaneously with the board of dental examiners.

**9.6(3)** Method of service, time of filing, and proof of mailing. Method of service, time of filing, and proof of mailing shall be as provided by 650—Chapter 51.

**650—9.7(17A) Consideration.** Upon request by petitioner, the board of dental examiners must schedule a brief and informal meeting between the original petitioner all intervenors, and the board of dental examiners, a member of the board of dental examiners, or a member of the staff of the board of dental examiners, to discuss the questions raised. The board of dental examiners may solicit comments from any person on the questions raised. Also, comments on the questions raised may be submitted to the board of dental examiners by any person.

**650—9.8(17A) Action on petition.**

**9.8(1)** Within the time allowed by 1998 Iowa Acts, chapter 1202, section 13(5), after receipt of a petition for a declaratory order, the board of dental examiners or designee shall take action on the petition as required by 1998 Iowa Acts, chapter 1202, section 13(5).

**9.8(2)** The date of issuance of an order or of a refusal to issue an order is as defined in 650—Chapter 51.

**650—9.9(17A) Refusal to issue order.**

**9.9(1)** The board of dental examiners shall not issue a declaratory order where prohibited by 1998 Iowa Acts, chapter 1202, section 13(1), and may refuse to issue a declaratory order on some or all questions raised for the following reasons:

## DENTAL EXAMINERS BOARD[650](cont'd)

1. The petition does not substantially comply with the required form.

2. The petition does not contain facts sufficient to demonstrate that the petitioner will be aggrieved or adversely affected by the failure of the board of Dental Examiners to issue an order.

3. The board of dental examiners does not have jurisdiction over the questions presented in the petition.

4. The questions presented by the petition are also presented in a current rule making, contested case, or other agency or judicial proceeding, that may definitively resolve them.

5. The questions presented by the petition would more properly be resolved in a different type of proceeding or by another body with jurisdiction over the matter.

6. The facts or questions presented in the petition are unclear, overbroad, insufficient, or otherwise inappropriate as a basis upon which to issue an order.

7. There is no need to issue an order because the questions raised in the petition have been settled due to a change in circumstances.

8. The petition is not based upon facts calculated to aid in the planning of future conduct but is, instead, based solely upon prior conduct in an effort to establish the effect of that conduct or to challenge an agency decision already made.

9. The petition requests a declaratory order that would necessarily determine the legal rights, duties, or responsibilities of other persons who have not joined in the petition, intervened separately, or filed a similar petition and whose position on the questions presented may fairly be presumed to be adverse to that of petitioner.

10. The petitioner requests the board of dental examiners to determine whether a statute is unconstitutional on its face.

**9.9(2)** A refusal to issue a declaratory order must indicate the specific grounds for the refusal and constitutes final agency action on the petition.

**9.9(3)** Refusal to issue a declaratory order pursuant to this provision does not preclude the filing of a new petition that seeks to eliminate the grounds for the refusal to issue an order.

**650—9.10(17A) Contents of declaratory order—effective date.** In addition to the order itself, a declaratory order must contain the date of its issuance, the name of petitioner and all intervenors, the specific statutes, rules, policies, decisions, or orders involved, the particular facts upon which it is based, and the reasons for its conclusion.

A declaratory order is effective on the date of issuance.

**650—9.11(17A) Copies of orders.** A copy of all orders issued in response to a petition for a declaratory order shall be mailed promptly to the original petitioner and all intervenors.

**650—9.12(17A) Effect of a declaratory order.** A declaratory order has the same status and binding effect as a final order issued in a contested case proceeding. It is binding on the board of dental examiners, the petitioner, and any intervenors (who consent to be bound) and is applicable only in circumstances where the relevant facts and the law involved are indistinguishable from those on which the order was based. As to all other persons, a declaratory order serves only as precedent and is not binding on the board of dental examiners. The issuance of a declaratory order constitutes final agency action on the petition.

These rules are intended to implement Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202.

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## DENTAL EXAMINERS BOARD[650]

## Notice of Intended Action

Twenty-five interested persons, a governmental subdivision, an agency or association of 25 or more persons may demand an oral presentation hereon as provided in Iowa Code section 17A.4(1)“b.”

Notice is also given to the public that the Administrative Rules Review Committee may, on its own motion or on written request by any individual or group, review this proposed action under section 17A.8(6) at a regular or special meeting where the public or interested persons may be heard.

Pursuant to the authority of Iowa Code section 147.76, the Board of Dental Examiners gives Notice of Intended Action to amend Chapter 25, “Continuing Education,” Iowa Administrative Code.

Chapter 25 is being amended to clarify that dental hygienists can complete a class in cardiopulmonary resuscitation by an organization that requires recertification on a less frequent basis than annual.

Any interested person may make written suggestions or comments on these proposed amendments on or before April 13, 1999. Such written comments should be directed to Constance L. Price, Executive Director, Board of Dental Examiners, Executive Hills West, 1209 East Court, Des Moines, Iowa 50319.

There will be a public hearing on April 21, 1999, at 1 p.m. in the Second Floor Conference Room, Executive Hills West, 1209 East Court, Des Moines, Iowa. At the hearing, persons will be asked to give their names and addresses for the record and to confine their remarks to the subject of the rule.

The proposed amendments are intended to implement Iowa Code section 147.10.

The following amendment is proposed.

Amend subrule 25.2(10) as follows:

**25.2(10)** A licensed dental hygienist shall furnish evidence of a valid annual certification for cardiopulmonary resuscitation which shall be credited toward the dental hygienist’s continuing education requirement for renewal of license. Such evidence shall be filed at the time of renewal of the license. Credit hours awarded shall not exceed six continuing education credit hours per biennium. *Valid annual certification means certification by an organization on an annual basis or, if that certifying organization requires certification on a less frequent basis, evidence that the hygienist has been properly certified for each year covered by the license renewal period.*

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## DENTAL EXAMINERS BOARD[650]

## Notice of Intended Action

Twenty-five interested persons, a governmental subdivision, an agency or association of 25 or more persons may demand an oral presentation hereon as provided in Iowa Code section 17A.4(1)“b.”

Notice is also given to the public that the Administrative Rules Review Committee may, on its own motion or on written request by any individual or group, review this proposed action under section 17A.8(6) at a regular or special meeting where the public or interested persons may be heard.

Pursuant to the authority of Iowa Code section 147.76, the Board of Dental Examiners hereby gives Notice of Intended Action to amend Chapter 31, “Complaints,” Iowa Administrative Code.

## DENTAL EXAMINERS BOARD[650](cont'd)

These amendments implement 1998 Iowa Acts, chapter 1202, which amends the Iowa Administrative Procedure Act and relate to contested case proceedings and matters currently under investigation.

Any interested person may make written suggestions or comments on these proposed amendments on or before April 13, 1999. Such written comments should be directed to Constance L. Price, Executive Director, Board of Dental Examiners, Executive Hills West, 1209 East Court Avenue, Des Moines, Iowa 50319.

There will be a public hearing on April 21, 1999, at 1 p.m. in the Second Floor Conference Room, Executive Hills West, 1209 East Court Avenue, Des Moines, Iowa. At the hearing, persons will be asked to give their names and addresses for the record and to confine their remarks to the subject of the amendments.

These amendments are intended to implement Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202. The following amendments are proposed.

ITEM 1. Amend 650—Chapter 31, title, as follows:

**COMPLAINTS AND INVESTIGATIONS**

ITEM 2. Adopt the following new rules 650—31.5(153) and 650—31.6(153) and renumber existing rules 650—31.5(153) to 650—31.13(272C) as 650—31.7(153) to 650—31.15(272C):

**650—31.5(153) Issuance of investigatory subpoenas.**

**31.5(1)** The executive director or designee may, upon the written request of a board investigator or on the director's own initiative, subpoena books, papers, records, and other real evidence which is necessary for the board to decide whether to institute a contested case proceeding. In the case of a subpoena for mental health records, each of the following conditions shall be satisfied prior to the issuance of the subpoena:

- a. The nature of the complaint reasonably justifies the issuance of a subpoena;
- b. Adequate safeguards have been established to prevent unauthorized disclosure;
- c. An express statutory mandate, articulated public policy, or other recognizable public interest favors access; and
- d. An attempt was made to notify the patient and to secure an authorization from the patient for release of the records at issue.

**31.5(2)** A written request for a subpoena or the director's written memorandum in support of the issuance of a subpoena shall contain the following:

- a. The name and address of the person to whom the subpoena will be directed;
- b. A specific description of the books, papers, records or other real evidence requested;
- c. An explanation of why the documents sought to be subpoenaed are necessary for the board to determine whether it should institute a contested case proceeding; and
- d. In the case of a subpoena request for mental health records, confirmation that the conditions described in 31.5(1) have been satisfied.

**31.5(3)** Each subpoena shall contain:

- a. The name and address of the person to whom the subpoena is directed;
- b. A description of the books, papers, records or other real evidence requested;

c. The date, time and location for production or inspection and copying;

d. The time within which a motion to quash or modify the subpoena must be filed;

e. The signature, address and telephone number of the executive director or designee;

f. The date of issuance; and

g. A return of service.

**31.5(4)** Any person who is aggrieved or adversely affected by compliance with the subpoena must, within 14 days after service of the subpoena, or before the time specified for compliance if such time is less than 14 days, file with the board a motion to quash or modify the subpoena. The motion shall describe the legal reasons why the subpoena should be quashed or modified, and may be accompanied by legal briefs or factual affidavits.

**31.5(5)** Upon receipt of a timely motion to quash or modify a subpoena, the board may request an administrative law judge to hold a hearing and issue a decision, or the board may conduct a hearing and issue a decision. Oral argument may be scheduled at the discretion of the board or the administrative law judge. The administrative law judge or the board may quash or modify the subpoena, deny the motion, or issue an appropriate protective order.

**31.5(6)** A person aggrieved by a ruling of an administrative law judge who desires to challenge that ruling must appeal the ruling to the board by serving on the executive director, either in person or by certified mail, a notice of appeal within ten days after service of the decision of the administrative law judge.

**31.5(7)** If the person contesting the subpoena is not the person under investigation, the board's decision is final for purposes of judicial review. If the person contesting the subpoena is the person under investigation, the board's decision is not final for purposes of judicial review until either the person is notified the investigation has been concluded with no formal action, or there is a final decision in the contested case.

**650—31.6(153) Board appearances.** The board may request a licensee to appear before the board to discuss a pending investigation. By electing to participate in the board appearance, the licensee waives the right to seek disqualification of a board member or the executive director from acting as presiding officer or participating in the making of a contested case decision on the grounds that the board member or executive director personally investigated the case.

**ARC 8826A**

**DENTAL EXAMINERS BOARD[650]**

**Notice of Intended Action**

Twenty-five interested persons, a governmental subdivision, an agency or association of 25 or more persons may demand an oral presentation hereon as provided in Iowa Code section 17A.4(1)“b.”

Notice is also given to the public that the Administrative Rules Review Committee may, on its own motion or on written request by any individual or group, review this proposed action under section 17A.8(6) at a regular or special meeting where the public or interested persons may be heard.

Pursuant to the authority of Iowa Code section 147.76, the Board of Dental Examiners gives Notice of Intended Action to rescind Chapter 51, “Procedural Rules,” and adopt a new Chapter 51, “Contested Cases,” Iowa Administrative Code.

## DENTAL EXAMINERS BOARD[650](cont'd)

These rules implement 1998 Iowa Acts, chapter 1202 [House File 667], which amends the Iowa Administrative Procedure Act. The new rules relate to contested case proceedings and matters currently under investigation.

Any interested person may make written suggestions or comments on this proposed amendment on or before April 13, 1999. Such written comments should be directed to Constance L. Price, Executive Director, Board of Dental Examiners, Executive Hills West, 1209 East Court Avenue, Des Moines, Iowa 50319.

There will be a public hearing on April 21, 1999, at 1 p.m. in the Second Floor Conference Room, Executive Hills West, 1209 East Court Avenue, Des Moines, Iowa. At the hearing, persons will be asked to give their names and addresses for the record and to confine their remarks to the subject of the rules.

This proposed amendment is intended to implement Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202 [House File 667].

The following amendment is proposed.

Rescind 650—Chapter 51 and adopt the following new chapter in lieu thereof:

**CHAPTER 51  
CONTESTED CASES**

**650—51.1(17A) Scope and applicability.** This chapter applies to contested case proceedings conducted by the board of dental examiners.

**650—51.2(17A) Definitions.** Except where otherwise specifically defined by law:

“Contested case” means a proceeding defined by Iowa Code section 17A.2(5) and includes any matter defined as a no factual dispute contested case under 1998 Iowa Acts, chapter 1202, section 14.

“Issuance” means the date of mailing of a decision or order or date of delivery if service is by other means unless another date is specified in the order.

“Party” means the state or the respondent.

“Presiding officer” means the board of dental examiners or a panel of the board. In a disciplinary contested case proceeding, the board may request that an administrative law judge make initial rulings on prehearing matters, and assist and advise the board in presiding at the disciplinary contested case hearing.

“Proposed decision” means the hearing panel’s recommended findings of fact, conclusions of law, decision, and order in a contested case in which the full board did not preside.

**650—51.3(17A) Probable cause.** In the event the board finds there is probable cause for taking disciplinary action against a licensee following investigation of a complaint, the board shall order a contested case hearing be commenced by the filing of a statement of charges and notice of hearing.

**650—51.4(17A) Legal review.** Every statement of charges and notice of hearing prepared by the board shall be reviewed by the office of the attorney general before they are filed.

**650—51.5(17A) Time requirements.**

**51.5(1)** Time shall be computed as provided in Iowa Code subsection 4.1(34).

**51.5(2)** For good cause, the presiding officer may extend or shorten the time to take any action, except as precluded by statute or by rule. Except for good cause stated in the record, before extending or shortening the time to take any action,

the presiding officer shall afford all parties an opportunity to be heard or to file written arguments.

**650—51.6(17A) Statement of charges and notice of hearing.**

**51.6(1) Delivery.** Delivery of the statement of charges and notice of hearing constitutes the commencement of the contested case proceeding. Delivery may be executed by:

- a. Personal service as provided in the Iowa Rules of Civil Procedure; or
- b. Restricted certified mail, return receipt requested; or
- c. Publication, as provided in the Iowa Rules of Civil Procedure.

**51.6(2) Contents.** The statement of charges and notice of hearing shall contain the following information:

- a. A statement of the time, place, and nature of the hearing;
- b. A statement of the legal authority and jurisdiction under which the hearing is to be held;
- c. A reference to the particular sections of the statutes and rules involved;
- d. A short and plain statement of the matters asserted. This statement shall contain sufficient detail to give the respondent fair notice of the allegations so the respondent may adequately respond to the charges, and to give the public notice of the matters at issue;
- e. Identification of all parties including the name, address and telephone number of the person who will act as advocate for the board or the state and of parties’ counsel where known;
- f. Reference to the procedural rules governing conduct of the contested case proceeding;
- g. Reference to the procedural rules governing informal settlement;
- h. Identification of the board as the presiding officer; and
- i. Notification of the time period in which a party may request, when applicable, and pursuant to 1998 Iowa Acts, chapter 1202, section 15(1) and rule 51.8(17A) that the presiding officer be an administrative law judge.

**650—51.7(17A) Legal representation.** Following the filing of the statement of charges and notice of hearing, the office of the attorney general shall be responsible for the legal representation of the public interest in all proceedings before the board.

**650—51.8(17A) Presiding officer in a disciplinary contested case.** The presiding officer in a disciplinary contested case shall be the board or a panel of the board. However, the board may request that an administrative law judge assist the board with initial rulings on prehearing matters. Decisions of the administrative law judge serving in this capacity are subject to the interlocutory appeal provisions of rule 51.25(17A). In addition, an administrative law judge may assist and advise the board in presiding at the contested case hearing.

**650—51.9(17A) Presiding officer in a nondisciplinary contested case.**

**51.9(1)** Any party in a nondisciplinary contested case who wishes to request that the presiding officer assigned to render a proposed decision be an administrative law judge employed by the department of inspections and appeals must file a written request within 20 days after service of a notice of hearing which identifies or describes the presiding officer as the board.

**51.9(2)** The board may deny the request only upon a finding that one or more of the following apply:

## DENTAL EXAMINERS BOARD[650](cont'd)

a. There is compelling need to expedite issuance of a final decision in order to protect the public health, safety, or welfare.

b. An administrative law judge with the qualifications identified in subrule 51.9(4) is unavailable to hear the case within a reasonable time.

c. The case involves significant policy issues of first impression that are inextricably intertwined with the factual issues presented.

d. The demeanor of the witnesses is likely to be dispositive in resolving the disputed factual issues.

e. Funds are unavailable to pay the costs of an administrative law judge and an interagency appeal.

f. The request was not timely filed.

g. The request is not consistent with a specified statute.

**51.9(3)** The board shall issue a written ruling specifying the grounds for its decision within 20 days after a request for an administrative law judge is filed. If the ruling is contingent upon the availability of an administrative law judge with the qualifications identified in subrule 51.9(4), the parties shall be notified at least 10 days prior to hearing if a qualified administrative law judge will not be available.

**51.9(4)** An administrative law judge assigned to act as presiding officer in a nondisciplinary contested case shall have a J.D. degree unless waived by the board.

**51.9(5)** Except as provided otherwise by another provision of law, all rulings by an administrative law judge acting as presiding officer in a nondisciplinary contested case are subject to appeal to the board. A party must seek any available intra-agency appeal in order to exhaust adequate administrative remedies. Such appeals must be filed within 10 days of the date of the issuance of the challenged ruling, but no later than the time for compliance with the order or the date of hearing, whichever is first.

**51.9(6)** Unless otherwise provided by law, when reviewing a proposed decision of an administrative law judge in a nondisciplinary contested case upon intra-agency appeal, the board shall have the powers of and shall comply with the provisions of this chapter which apply to presiding officers.

#### 650—51.10(17A) Disqualification.

**51.10(1)** A presiding officer or other person shall withdraw from participation in the making of any proposed or final decision in a contested case if that person:

a. Has a personal bias or prejudice concerning a party or a representative of a party;

b. Has personally investigated, prosecuted or advocated, in connection with that case, the specific controversy underlying that case, another pending factually related contested case, or a pending factually related controversy that may culminate in a contested case involving the same parties;

c. Is subject to the authority, direction or discretion of any person who has personally investigated, prosecuted or advocated in connection with that contested case, the specific controversy underlying that contested case, or a pending factually related contested case or controversy involving the same parties;

d. Has acted as counsel to any person who is a private party to that proceeding within the past two years;

e. Has a personal financial interest in the outcome of the case or any other significant personal interest that could be substantially affected by the outcome of the case;

f. Has a spouse or relative within the third degree of relationship that (1) is a party to the case, or an officer, director or trustee of a party; (2) is a lawyer in the case; (3) is known to have an interest that could be substantially affected

by the outcome of the case; or (4) is likely to be a material witness in the case; or

g. Has any other legally sufficient cause to withdraw from participation in the decision making in that case.

**51.10(2)** The term "personally investigated" means taking affirmative steps to interview witnesses directly or to obtain documents or other information directly. The term "personally investigated" does not include:

a. General direction and supervision of assigned investigators;

b. Unsolicited receipt of information which is relayed to assigned investigators;

c. Review of another person's investigative work product in the course of determining whether there is probable cause to initiate a proceeding; or

d. Exposure to factual information while performing other board functions, including fact gathering for purposes other than investigation of the matter which culminates in a contested case.

Factual information relevant to the merits of a contested case received by a person who later serves as presiding officer in that case shall be disclosed if required by Iowa Code section 17A.17 as amended by 1998 Iowa Acts, chapter 1202, section 19, and subrules 51.10(3) and 51.23(9).

**51.10(3)** In a situation where a presiding officer or other person knows of information which might reasonably be deemed to be a basis for disqualification and decides voluntary withdrawal is unnecessary, that person shall submit the relevant information for the record by affidavit and shall provide for the record a statement of the reasons for the determination that withdrawal is unnecessary.

**51.10(4)** If a party asserts disqualification on any appropriate ground, including those listed in subrule 51.10(1), the party shall file a motion supported by an affidavit pursuant to 1998 Iowa Acts, chapter 1202, section 19(7). The motion must be filed as soon as practicable after the reason alleged in the motion becomes known to the party. The board shall determine the matter as part of the record in this case.

#### 650—51.11(17A) Consolidation—severance.

**51.11(1)** Consolidation. The presiding officer may consolidate any or all matters at issue in two or more contested case proceedings where:

a. The matters at issue involve common parties or common questions of fact or law;

b. Consolidation would expedite and simplify consideration of the issues involved; and

c. Consolidation would not adversely affect the rights of any of the parties to those proceedings.

**51.11(2)** Severance. The presiding officer may, for good cause shown, order any contested case proceedings or portions thereof severed.

#### 650—51.12(17A) Pleadings.

**51.12(1)** Pleadings may be required by rule, by the notice of hearing, or by order of the presiding officer.

**51.12(2)** Answer. An answer shall be filed within 20 days of service of the statement of charges and notice of hearing.

a. An answer shall show on whose behalf it is filed and specifically admit, deny, or otherwise answer all material allegations of the statement of charges. It shall state any facts deemed to show an affirmative defense and contain as many additional defenses as the pleader may claim.

b. An answer shall state the name, address and telephone number of the person filing the answer, the person or entity

## DENTAL EXAMINERS BOARD[650](cont'd)

on whose behalf it is filed, and the attorney representing that person, if any.

c. Any allegation in the statement of charges not denied in the answer is considered admitted. The presiding officer may refuse to consider any defense not raised in the answer which could have been raised on the basis of facts known when the answer was filed if any party would be prejudiced.

**51.12(3) Amendment.** Amendments to the statement of charges and to an answer may be allowed with the consent of the parties or in the discretion of the presiding officer who may impose terms or grant a continuance.

**650—51.13(17A) Service and filing.**

**51.13(1) Service—when required.** Except where otherwise provided by law, every document filed in a contested case proceeding shall be served upon each of the parties of record to the proceeding, including the assistant attorney general designated as prosecutor for the state or the board, simultaneously with their filing. Except for the original notice of hearing and an application for rehearing as provided in Iowa Code section 17A.16(2), the party filing a document is responsible for service on all parties.

**51.13(2) Service—how made.** Service upon a party represented by an attorney shall be made upon the attorney unless otherwise ordered. Service is made by delivery or by mailing a copy to the person's last-known address. Service by mail is complete upon mailing, except where otherwise specifically provided by statute, rule, or order.

**51.13(3) Filing—when required.** After the notice of hearing, all documents in a contested case proceeding shall be filed with the board. All documents that are required to be served upon a party shall be filed simultaneously with the board.

**51.13(4) Filing—when made.** Except where otherwise provided by law, a document is deemed filed at the time it is delivered to the Board of Dental Examiners, Executive Hills West, 1209 East Court, Des Moines, Iowa 50319, delivered to an established courier service for immediate delivery to that office, or mailed by first-class mail or state interoffice mail to that office, so long as there is proof of mailing.

**51.13(5) Proof of mailing.** Proof of mailing includes either: a legible United States Postal Service postmark on the envelope, a certificate of service, a notarized affidavit, or a certification in substantially the following form:

I certify under penalty of perjury and pursuant to the laws of Iowa that, on (date of mailing), I mailed copies of (describe document) addressed to the Board of Dental Examiners, Executive Hills West, 1209 East Court, Des Moines, Iowa 50319 and to the names and addresses of the parties listed below by depositing the same in (a United States post office mailbox with correct postage properly affixed or state interoffice mail).

(Date)

(Signature)

**650—51.14(17A) Discovery.**

**51.14(1) Discovery procedures applicable in civil actions** are applicable in contested cases. Unless lengthened or shortened by these rules or by order of the presiding officer, time periods for compliance with discovery shall be as provided in the Iowa Rules of Civil Procedure.

**51.14(2)** Any motion relating to discovery shall allege that the moving party has previously made a good-faith attempt to resolve the discovery issues involved with the opposing party. Motions in regard to discovery shall be ruled upon by the presiding officer. Opposing parties shall be afforded the opportunity to respond within ten days of the filing of the motion unless the time is shortened as provided in

subrule 51.14(1). The presiding officer may rule on the basis of the written motion and any response, or may order argument on the motion.

**650—51.15(17A,272C) Issuance of subpoenas in a contested case.**

**51.15(1)** Subpoenas issued in a contested case may compel the attendance of witnesses at depositions or hearing, and may compel the production of books, papers, records, and other real evidence. A command to produce evidence or to permit inspection may be joined with a command to appear at deposition or hearing, or may be issued separately. Subpoenas shall be issued by the executive director or designee upon written request. A request for a subpoena of mental health records must confirm that the conditions described in subrule 31.5(1) have been satisfied prior to the issuance of the subpoena.

**51.15(2)** A request for a subpoena shall include the following information, as applicable, unless the subpoena is requested to compel testimony or documents for rebuttal or impeachment purposes:

- a. The name, address and telephone number of the person requesting the subpoena;
- b. The name and address of the person to whom the subpoena shall be directed;
- c. The date, time, and location at which the person shall be commanded to attend and give testimony;
- d. Whether the testimony is requested in connection with a deposition or hearing;
- e. A description of the books, papers, records or other real evidence requested;
- f. The date, time and location for production, or inspection and copying; and,
- g. In the case of a subpoena request for mental health records, confirmation that the conditions described in subrule 31.5(1) have been satisfied.

**51.15(3)** Each subpoena shall contain, as applicable:

- a. The caption of the case;
- b. The name, address and telephone number of the person who requested the subpoena;
- c. The name and address of the person to whom the subpoena is directed;
- d. The date, time, and location at which the person is commanded to appear;
- e. Whether the testimony is commanded in connection with a deposition or hearing;
- f. A description of the books, papers, records or other real evidence the person is commanded to produce;
- g. The date, time and location for production, or inspection and copying;
- h. The time within which a motion to quash or modify the subpoena must be filed;
- i. The signature, address and telephone number of the executive director or designee;
- j. The date of issuance;
- k. A return of service.

**51.15(4)** Unless a subpoena is requested to compel testimony or documents for rebuttal or impeachment purposes, the executive director or designee shall mail copies of all subpoenas to the parties to the contested case. The person who requested the subpoena is responsible for serving the subpoena upon the subject of the subpoena.

**51.15(5)** Any person who is aggrieved or adversely affected by compliance with the subpoena, or any party to the contested case who desires to challenge the subpoena must, within 14 days after service of the subpoena, or before the

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time specified for compliance if such time is less than 14 days, file with the board a motion to quash or modify the subpoena. The motion shall describe the legal reasons why the subpoena should be quashed or modified, and may be accompanied by legal briefs or factual affidavits.

**51.15(6)** Upon receipt of a timely motion to quash or modify a subpoena, the board may request an administrative law judge to hold a hearing and issue a decision, or the board may conduct the hearing and issue a decision. Oral argument may be scheduled at the discretion of the board or administrative law judge. The administrative law judge or the board may quash or modify the subpoena, deny the motion, or issue an appropriate protective order.

**51.15(7)** A person aggrieved by a ruling of an administrative law judge who desires to challenge that ruling must appeal the ruling to the board by serving on the board's executive director, either in person or by certified mail, a notice of appeal within ten days after service of the decision of the administrative law judge.

**51.15(8)** If the person contesting the subpoena is not the person under investigation, the board's decision is final for purposes of judicial review. If the person contesting the subpoena is the person under investigation, the board's decision is not final for purposes of judicial review until there is a final decision in the contested case.

**650—51.16(17A) Motions.**

**51.16(1)** No technical form for motions is required. However, prehearing motions must be in writing, state the grounds for relief, and state the relief sought.

**51.16(2)** Any party may file a written response to a motion within ten days after the motion is served, unless the time period is extended or shortened by the presiding officer. The presiding officer may consider a failure to respond within the required time period in ruling on a motion.

**51.16(3)** The presiding officer may schedule oral argument on any motion.

**51.16(4)** Motions pertaining to the hearing must be filed and served at least ten days prior to the date of hearing unless there is good cause for permitting later action or the time for such action is lengthened or shortened by rule of the board or an order of the presiding officer.

**650—51.17(17A) Prehearing conference.**

**51.17(1)** Any party may request a prehearing conference. Prehearing conferences shall be conducted by the executive director, who may request the assistance of an administrative law judge. A written request for prehearing conference or an order for prehearing conference on the executive director's own motion shall be filed prior to the contested case hearing, but no later than 20 days prior to the hearing date.

Written notice of the prehearing conference shall be given by the executive director to all parties. For good cause the executive director may permit variances from this rule.

**51.17(2)** The parties at a prehearing conference shall be prepared to discuss the following subjects, and the executive director or administrative law judge may issue appropriate orders concerning:

- a. The possibility of settlement.
- b. The entry of a scheduling order to include deadlines for completion of discovery.
- c. Stipulations of law or fact.
- d. Stipulations on the admissibility of exhibits.
- e. Submission of expert and other witness lists. Witness lists may be amended subsequent to the prehearing conference within the time limits established by the executive director or administrative law judge at the hearing conference.

Any such amendments must be served on all parties. Witnesses not listed on the final witness list may be excluded from testifying unless there was good cause for the failure to include their names.

f. Submission of exhibit lists. Exhibit lists may be amended subsequent to the prehearing conference within the time limits established by the executive director or administrative law judge at the prehearing conference. Exhibits other than rebuttal exhibits that are not listed on the final exhibit list may be excluded from admission into evidence unless there was good cause for the failure to include them.

g. Stipulations for waiver of any provision of law.

h. Identification of matters which the parties intend to request be officially noticed.

i. Consideration of any additional matters which will expedite the hearing.

**51.17(3)** Prehearing conferences may be conducted by telephone unless otherwise ordered.

**650—51.18(17A) Continuances.** Unless otherwise provided, applications for continuances shall be filed with the board. In the event the application for continuance is not contested, the executive director shall serve as presiding officer and issue the appropriate order. In the event the application for continuance is contested, the matter shall be heard by the board as presiding officer or may be delegated by the board to an administrative law judge.

**51.18(1)** A written application for a continuance shall:

a. Be made at the earliest possible time and no less than five working days before the hearing except in case of unanticipated emergencies;

b. State the specific reasons for the request; and

c. Be signed by the requesting party or the party's representative.

An oral application for a continuance may be made if the presiding officer waives the requirement for a written motion. However, a party making such an oral application for a continuance must confirm that request by written application within two days after the oral request unless that requirement is waived by the presiding officer. No application for continuance shall be made or granted without notice to all parties except in an emergency where notice is not feasible.

**51.18(2)** In determining whether to grant a continuance, the presiding officer may consider:

a. Prior continuances;

b. The interests of all parties;

c. The public interest;

d. The likelihood of informal settlement;

e. The existence of an emergency;

f. Any objection;

g. Any applicable time requirements;

h. The existence of a conflict in the schedules of counsel, parties, or witnesses;

i. The timeliness of the request; and

j. Other relevant factors.

The presiding officer may require documentation of any grounds for continuance.

**650—51.19(153) Settlements.**

**51.19(1)** A contested case may be resolved by informal settlement. Settlement negotiations may be initiated at any stage of a contested case by the executive director, prosecuting attorney, the respondent, the board or its designee. Neither the board nor the respondent is required to participate in the informal settlement process. The executive director and chairperson of the board, or the chairperson's designee(s), shall have authority to negotiate on behalf of the board.

## DENTAL EXAMINERS BOARD[650](cont'd)

**51.19(2)** The full board shall not be involved in negotiation until a written proposed settlement is submitted to the full board for approval, unless both parties waive this prohibition.

**51.19(3)** Consent to negotiation by the respondent during informal settlement negotiation constitutes a waiver of notice and opportunity to be heard pursuant to Iowa Code section 17A.17 as amended by 1998 Iowa Acts, chapter 1202. Thereafter, the prosecuting attorney is authorized to discuss informal settlement with the board chairperson or designee(s).

**51.19(4)** Negotiations for a proposed settlement shall be completed at least ten days prior to the hearing date set by the order for hearing. However, after consultation with the board chairperson or designee, the executive director shall have the power to grant additional time for continued negotiations in instances where additional time will likely lead to a satisfactory settlement prior to the hearing date.

**51.19(5)** No proposed settlement shall be presented to the board for approval until it is in final, written form signed by the respondent.

**51.19(6)** All proposed settlements are subject to approval of a majority of the full board. If the board fails to approve a proposed settlement, it shall be of no force or effect to either party. The proposed settlement shall be binding if approved by the board and signed by both the chairperson or the chairperson's designee and the respondent.

**51.19(7)** A board member who participates in the negotiation of a proposed settlement is not disqualified from participating in the adjudication of the contested case.

**51.19(8)** Consent to settlement negotiations by the respondent constitutes a waiver of any objection to the participation in the adjudication of the contested case of any board member who participated in the review of a settlement agreement which was not approved by the board.

**650—51.20(17A) Hearing procedures.**

**51.20(1)** A hearing may be conducted before the board or a panel of not less than three members of the board at least two of whom are licensed by the board.

**51.20(2)** When, in the opinion of a majority of the board, it is desirable to obtain specialists within an area of practice when holding disciplinary hearings, the board may appoint a panel of three specialists who are not board members to make findings of fact and to report to the board. Such findings shall not include any recommendation for or against licensee discipline.

**51.20(3)** The presiding officer shall have the authority to administer oaths, to admit or exclude testimony or other evidence, and to rule on all motions and objections. The presiding officer may request that an administrative law judge perform any of these functions, and may be assisted and advised by an administrative law judge.

**51.20(4)** All objections shall be timely made and stated on the record.

**51.20(5)** Parties have the right to participate or to be represented in all hearings or prehearing conferences related to their case. Any party may be represented by an attorney at their own expense.

**51.20(6)** Subject to terms and conditions prescribed by the presiding officer, parties have the right to introduce evidence on issues of material fact, cross-examine witnesses present at the hearing as necessary for a full and true disclosure of the facts, present evidence in rebuttal, and submit briefs and engage in oral argument.

**51.20(7)** The presiding officer shall maintain the decorum of the hearing and may refuse to admit or may expel anyone whose conduct is disorderly.

**51.20(8)** Witnesses may be sequestered during the hearing.

**51.20(9)** The presiding officer shall have authority to grant immunity from disciplinary action to a witness as provided by Iowa Code section 272C.6(3).

**51.20(10)** The presiding officer shall conduct the hearing in the following manner:

a. The presiding officer shall give an opening statement briefly describing the nature of the proceedings;

b. The parties shall be given an opportunity to present opening statements;

c. Parties shall present their cases in the sequence determined by the presiding officer;

d. Each witness shall be sworn or affirmed by the presiding officer or the court reporter, and be subject to examination and cross-examination. The presiding officer may limit questioning in a manner consistent with law;

e. When all parties and witnesses have been heard, parties may be given the opportunity to present final arguments.

**51.20(11)** The board members and administrative law judge have the right to question a witness. Examination of witnesses by board members is subject to properly raised objections.

**51.20(12)** The hearing shall be open to the public unless the licensee requests that the hearing be closed.

**650—51.21(17A) Evidence.**

**51.21(1)** The presiding officer shall rule on admissibility of evidence and may, where appropriate, take official notice of facts in accordance with all applicable requirements of law.

**51.21(2)** Stipulation of facts is encouraged. The presiding officer may make a decision based on stipulated facts.

**51.21(3)** Evidence in the proceeding shall be confined to the issues as to which the parties received notice prior to the hearing unless the parties waive their right to such notice or the presiding officer determines that good cause justifies expansion of the issues. If the presiding officer decides to admit evidence on issues outside the scope of the notice over the objection of a party who did not have actual notice of those issues, that party, upon timely request, shall receive a continuance sufficient to amend pleadings and to prepare on the additional issue.

**51.21(4)** The party seeking admission of an exhibit must provide opposing parties with an opportunity to examine the exhibit prior to the ruling on its admissibility. Copies of documents should normally be provided to opposing parties.

All exhibits admitted into evidence shall be appropriately marked and be made part of the record.

**51.21(5)** Any party may object to specific evidence or may request limits on the scope of any examination or cross-examination. Such an objection shall be accompanied by a brief statement of the grounds upon which it is based. The objection, the ruling on the objection, and the reasons for the ruling shall be noted in the record. The presiding officer may rule on the objection at the time it is made or may reserve a ruling until the written decision.

**51.21(6)** Whenever evidence is ruled inadmissible, the party offering that evidence may submit an offer of proof on the record. The party making the offer of proof for excluded oral testimony shall briefly summarize the testimony or, with permission of the presiding officer, present the testimony. If the excluded evidence consists of a document or exhibit, it

## DENTAL EXAMINERS BOARD[650](cont'd)

shall be marked as part of an offer of proof and inserted in the record.

**650—51.22(17A) Default.**

**51.22(1)** If a party fails to appear or participate in a contested case proceeding after proper service of notice, the presiding officer may, if no adjournment is granted, enter a default decision or proceed with the hearing and render a decision in the absence of the party.

**51.22(2)** Where appropriate and not contrary to law, any party may move for default against a party who has failed to appear after proper service.

**51.22(3)** Default decisions or decisions rendered on the merits after a party has failed to appear or participate in a contested case proceeding become final board action unless, within 15 days after the date of notification or mailing of the decision, a motion to vacate is filed and served on all parties or an appeal of a decision on the merits is timely initiated within the time provided by rule 51.26(153). A motion to vacate must state all facts relied upon by the moving party which establish that good cause existed for that party's failure to appear or participate at the contested case proceeding. Each fact so stated must be substantiated by at least one sworn affidavit of a person with personal knowledge of each such fact, which affidavit(s) must be attached to the motion.

**51.22(4)** The time for further appeal of a decision for which a timely motion to vacate has been filed is stayed pending a decision on the motion to vacate.

**51.22(5)** Properly substantiated and timely filed motions to vacate shall be granted only for good cause shown. The burden of proof as to good cause is on the moving party. Adverse parties shall have ten days to respond to a motion to vacate. Adverse parties shall be allowed to conduct discovery as to the issue of good cause and to present evidence on the issue prior to a decision on the motion, if a request to do so is included in that party's response.

**51.22(6)** "Good cause" for purposes of this rule shall have the same meaning as "good cause" for setting aside a default judgment under Iowa Rule of Civil Procedure 236.

**51.22(7)** A decision denying a motion to vacate is subject to further appeal within the time limit allowed for further appeal of a decision on the merits in the contested case proceeding. A decision granting a motion to vacate is subject to interlocutory appeal by the adverse party pursuant to rule 51.25(17A).

**51.22(8)** If a motion to vacate is granted and no timely interlocutory appeal has been taken, the presiding officer shall issue another notice of hearing and the contested case shall proceed accordingly.

**51.22(9)** A default decision may provide either that the default decision is to be stayed pending a timely motion to vacate or that the default decision is to take effective immediately, subject to a request for stay under rule 51.28(17A).

**650—51.23(17A) Ex parte communication.**

**51.23(1)** Prohibited communications. Unless required for the disposition of ex parte matters specifically authorized by statute, following issuance of the notice of hearing, there shall be no communication, directly or indirectly, between the presiding officer and any party or representative of any party or any other person with a direct or indirect interest in such case in connection with any issue of fact or law in the case except upon notice and opportunity for all parties to participate. Nothing in this provision is intended to preclude board members from communicating with other board members or members of the board staff, other than those with a personal interest in, or those engaged in personally investi-

gating as defined in subrule 51.10(2), prosecuting, or advocating in, either the case under consideration or a pending factually related case involving the same parties, as long as those persons do not directly or indirectly communicate to the presiding officer any ex parte communications they have received of a type that the presiding officer would be prohibited from receiving or that furnish, augment, diminish, or modify the evidence in the record.

**51.23(2)** Prohibitions on ex parte communications commence with the issuance of the notice of hearing in a contested case and continue for as long as the case is pending before the board.

**51.23(3)** Written, oral or other forms of communication are "ex parte" if made without notice and opportunity for all parties to participate.

**51.23(4)** To avoid prohibited ex parte communications, notice must be given in a manner reasonably calculated to give all parties a fair opportunity to participate. Notice of written communications shall be provided in compliance with rule 51.13(17A) and may be supplemented by telephone, facsimile, electronic mail or other means of notification. Where permitted, oral communications may be initiated through conference telephone call including all parties or their representatives.

**51.23(5)** Persons who jointly act as presiding officer in a pending contested case may communicate with each other without notice or opportunity for parties to participate.

**51.23(6)** The executive director or other persons may be present in deliberations or otherwise advise the presiding officer without notice or opportunity for parties to participate as long as they are not disqualified from participating in the making of a proposed or final decision under any provision of law and they comply with subrule 51.23(1).

**51.23(7)** Communications with the presiding officer involving uncontested scheduling or procedural matters do not require notice or opportunity for parties to participate. Parties should notify other parties prior to initiating such contact with the presiding officer when feasible, and shall notify other parties when seeking to continue hearings or other deadlines pursuant to rule 51.18(17A).

**51.23(8)** Disclosure of prohibited communications. A presiding officer who receives a prohibited ex parte communication during the pendency of a contested case must initially determine if the effect of the communication is so prejudicial that the presiding officer should be disqualified.

If the presiding officer determines that disqualification is warranted, a copy of any prohibited written communication, all written responses to the communication, a written summary stating the substance of any prohibited oral or other communication not available in written form for disclosure, all responses made, and the identity of each person from whom the presiding officer received a prohibited ex parte communication shall be submitted for inclusion in the record under seal by protective order.

If the presiding officer determines that disqualification is not warranted, such documents shall be submitted for inclusion in the record and served on all parties. Any party desiring to rebut the prohibited communication must be allowed the opportunity to do so upon written request filed within ten days after notice of the communication.

**51.23(9)** Promptly after being assigned to serve as presiding officer at any stage in a contested case proceeding, a presiding officer shall disclose to all parties material factual information received through ex parte communication prior to such assignment, unless the factual information has already been or shortly will be disclosed pursuant to Iowa Code sec-

## DENTAL EXAMINERS BOARD[650](cont'd)

tion 17A.13(2) or through discovery. Factual information contained in an investigative report or similar document need not be separately disclosed by the presiding officer as long as such documents have been or will shortly be provided to the parties.

**51.23(10)** The presiding officer may render a proposed or final decision imposing appropriate sanctions for violations of this rule including default, a decision against the offending party, censure, suspension or revocation of the privilege to practice before the board. Violation of *ex parte* communication prohibitions by board personnel shall be reported to the board and its executive director for possible sanctions including censure, suspension, dismissal, or other disciplinary action.

**650—51.24(17A) Recording costs.** Upon request, the board shall provide a copy of the whole or any portion of the record at cost. The cost of preparing a copy of the record or of transcribing the hearing record shall be paid by the requesting party.

**650—51.25(17A) Interlocutory appeals.** Upon written request of a party or on its own motion, the board may review an interlocutory order of the executive director, administrative law judge, or hearing panel. In determining whether to do so, the board shall consider:

1. The extent to which its granting the interlocutory appeal would expedite final resolution of the case; and
2. The extent to which review of that interlocutory order by the board at the time it reviews the proposed decision of the presiding officer would provide an adequate remedy.

Any request for interlocutory review must be filed within 14 days of issuance of the challenged order, but no later than the time for compliance with the order or the date of hearing, whichever is first.

**650—51.26(153) Final decision.**

**51.26(1)** When five or more members of the board preside over the reception of the evidence at the hearing, the decision is a final decision.

**51.26(2)** When a panel of three specialists presides over the hearing, a transcript of the proceedings, together with exhibits presented and the findings of fact of the panel, shall be considered by the board at the earliest practicable time. The parties or the parties' attorneys shall, upon notice prescribed by the board, have the opportunity to appear personally to represent their positions and arguments to the board. The decision of the board is a final decision.

**51.26(3)** When a panel of three board members of the dental hygiene committee presides over the hearing, the panel's decision is a proposed decision. A proposed decision becomes a final decision without further proceedings unless appealed in accordance with the following procedures:

- a. A proposed decision may be appealed to the board by either party by filing a notice of appeal 30 days following the issuance of the proposed decision.
- b. The board may initiate review of a proposed decision on its own motion at any time within 30 days of the issuance of the proposed decision.
- c. Following receipt of a notice of appeal, the board shall enter an order establishing a briefing schedule. The parties shall serve nine copies of their briefs on the board and shall furnish an additional copy to each party by first-class mail.
- d. Oral argument of the appeal is discretionary, but may be required by the board upon its own motion. At the times designated for filing briefs and arguments, either party may request oral argument. If a request for oral argument is

granted, or if required by the board, the executive director shall notify all parties of the date, time and place.

e. The record on appeal shall be the entire record made before the hearing panel. Costs associated with the appeal shall be paid by the appealing party.

**51.26(4)** Requests to present additional evidence. A party may request the taking of additional evidence only by establishing that:

- a. The facts or other evidence arose after the original proceeding, or
- b. The party offering such evidence could not reasonably have provided such evidence at the original proceedings, or
- c. The party offering the additional evidence was misled by any party as to the necessity for offering such evidence at the original proceeding.

A written request to present additional evidence must be filed with the notice of appeal or, by a nonappealing party, within 14 days of service of the notice of appeal. The board may remand a case to the hearing panel for further hearing or may itself preside at the taking of additional evidence.

**650—51.27(17A) Applications for rehearing.**

**51.27(1)** By whom filed. Any party to a contested case proceeding may file an application for rehearing from a final order.

**51.27(2) Content of application.** The application for rehearing shall state on whose behalf it is filed, the specific grounds for rehearing, and the relief sought. In addition, the application shall state whether the applicant desires reconsideration of all or part of the board decision on the existing record and whether, on the basis of the grounds enumerated in subrule 51.27(5), the applicant requests an opportunity to submit additional evidence.

**51.27(3) Time of filing.** The application shall be filed with the board within 20 days after issuance of the final decision.

**51.27(4) Notice to other parties.** A copy of the application shall be timely mailed by the applicant to all parties of record not joining therein.

**51.27(5) Additional evidence.** A request that additional evidence be considered on rehearing shall be governed by subrule 51.26(4).

**51.27(6) Disposition.** Any application for a rehearing shall be deemed denied unless the board grants the application within 20 days after its filing.

**650—51.28(17A) Stays of board actions.**

**51.28(1)** When available. Any party to a contested case proceeding may petition the board for a stay of an order issued in that proceeding or for other temporary remedies, pending review by the board or pending judicial review. The petition shall state the reasons justifying a stay or other temporary remedy.

**51.28(2)** When granted. In determining whether to grant a stay, the board shall consider the factors listed in 1998 Iowa Acts, chapter 1202, section 23(5c). The board shall not grant a stay in any case in which the district court would be expressly prohibited by statute from granting a stay.

**650—51.29(17A) No factual dispute contested cases.** If the parties agree that no dispute of material fact exists as to a matter that would be a contested case if such a dispute of fact existed, the parties may present all relevant admissible evidence either by stipulation or otherwise as agreed by the parties, without necessity for the production of evidence at an evidentiary hearing. If such agreement is reached, a jointly submitted schedule detailing the method and timetable for

## DENTAL EXAMINERS BOARD[650](cont'd)

submission of the record, briefs and oral argument should be submitted to the presiding officer for approval as soon as practicable.

**650—51.30(17A) Emergency adjudicative proceedings.**

**51.30(1) Necessary emergency action.** To the extent necessary to prevent or avoid immediate danger to the public health, safety, or welfare, and consistent with the Constitution and other provisions of law, the board may issue a written order in compliance with 1998 Iowa Acts, chapter 1202, section 21, to suspend a license in whole or in part, order the cessation of any continuing activity, order affirmative action, or take other action within the jurisdiction of the board by emergency adjudicative order. Before issuing an emergency adjudicative order the board shall consider factors including, but not limited to, the following:

- a. Whether there has been a sufficient factual investigation to ensure that the board is proceeding on the basis of reliable information;
- b. Whether the specific circumstances which pose immediate danger to the public health, safety or welfare have been identified and determined to be continuing;
- c. Whether the person required to comply with the emergency adjudicative order may continue to engage in other activities without posing immediate danger to the public health, safety or welfare;
- d. Whether imposition of monitoring requirements or other interim safeguards would be sufficient to protect the public health, safety or welfare; and
- e. Whether the specific action contemplated by the board is necessary to avoid the immediate danger.

**51.30(2) Issuance of order.**

a. An emergency adjudicative order shall contain findings of fact, conclusions of law, and policy reasons to justify the determination of an immediate danger in the board's decision to take immediate action. The order is a public record.

b. The written emergency adjudicative order shall be immediately delivered to the person who is required to comply with the order by utilizing one or more of the following procedures:

- (1) Personal delivery;
- (2) Certified mail, return receipt requested, to the last address on file with the board;
- (3) Certified mail to the last address on file with the board; or
- (4) Fax. Fax may be used as the sole method of delivery if the person required to comply with the order has filed a written request that board orders be sent by fax and has provided a fax number for that purpose.

c. To the degree practicable, the board shall select the procedure for providing written notice that best ensures prompt, reliable delivery.

**51.30(3) Oral notice.** Unless the written emergency adjudicative order is provided by personal delivery on the same day that the order issues, the board shall make reasonable immediate efforts to contact by telephone the persons who are required to comply with the order.

**51.30(4) Completion of proceedings.** After the issuance of an emergency adjudicative order, the board shall proceed as quickly as feasible to complete any proceedings that would be required if the matter did not involve an immediate danger.

Issuance of a written emergency adjudicative order shall include notification of the date on which board proceedings are scheduled for completion. After issuance of an emergency adjudicative order, continuance of further board proceedings to a later date will be granted only in compelling cir-

cumstances upon application in writing unless the person who is required to comply with the order is the party requesting the continuance.

**650—51.31(153) Judicial review.** Judicial review of the board's decision may be sought in accordance with the terms of Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202, and Iowa Code section 153.33(4) "g" and "h."

**650—51.32(153) Notification of decision.** All parties to a contested case shall be promptly furnished with a copy of any decision or order either by personal delivery or by certified or first-class mailing. Delivery or first-class mailing of any decision or order to an attorney of record in a contested case hearing shall constitute notification of the respondent. Service by mail is complete upon mailing.

**650—51.33(153) Publicizing disciplinary action.**

**51.33(1)** Final decisions of the board relating to licensee discipline shall be transmitted to the appropriate state and national professional associations and news media, which may include a newspaper(s) of general circulation, and to other news media, person or organization upon request.

**51.33(2)** The board shall notify other boards of dentistry in states where the respondent is also licensed of disciplinary action taken against the Iowa licensee.

**51.33(3)** The board shall notify the American Association of Dental Examiners of disciplinary action taken against an Iowa licensee.

**51.33(4)** The board shall, in accordance with federal law, notify the National Practitioners Data Bank of disciplinary action taken against an Iowa licensee.

**650—51.34(153) Reinstatement.**

**51.34(1)** Any person whose license has been revoked or suspended by the board may apply to the board for reinstatement in accordance with the terms of the order of revocation or suspension.

**51.34(2)** If the order of revocation or suspension did not establish terms upon which reinstatement might occur, or if the license was voluntarily surrendered pursuant to disciplinary action, an initial application for reinstatement may not be made until one year has elapsed from the date of the final order.

**51.34(3)** All proceedings for reinstatement shall be initiated by the respondent, who shall file with the board an application for the reinstatement of the license. All proceedings upon the petition for reinstatement shall be subject to the same rules of procedure as other disciplinary matters before the board.

**51.34(4)** An application for reinstatement shall allege facts which, if established, will be sufficient to enable the board to determine that the basis for the revocation or suspension no longer exists and that it will be in the public interest for the license to be reinstated. The burden of proof to establish such facts shall be on the respondent.

**51.34(5)** An application for reinstatement may include a request for a hearing on the issues raised on the application or any other information furnished to the board. The hearing on an application for reinstatement shall be a contested case proceeding within the meaning of Iowa Code section 17A.2(2).

**51.34(6)** The order to grant or deny reinstatement shall include findings of fact and conclusions of law. If reinstatement is granted, terms and conditions of licensure may be imposed. Such terms and conditions may include restrictions on the licensee's practice. This order will be published as provided for in rule 51.33(153).

## DENTAL EXAMINERS BOARD[650](cont'd)

**51.34(7)** A person whose license to practice dentistry or dental hygiene was revoked or suspended must successfully complete the examination required at the time of reinstatement for dental or dental hygiene licensure. The board may in its discretion require remedial training in addition to or in lieu of the examination requirements.

**650—51.35(153) Disciplinary hearings—fees and costs.**

**51.35(1) Definitions.** As used in this chapter in relation to a formal disciplinary action filed by the board against a licensee:

“Deposition” means the testimony of a person pursuant to subpoena or at the request of the state of Iowa taken in a setting other than a hearing.

“Expenses” means costs incurred by persons appearing pursuant to subpoena or at the request of the state of Iowa for purposes of providing testimony on the part of the state of Iowa in a hearing or other official proceeding and shall include mileage reimbursement at the rate specified in Iowa Code section 70A.9 or, if commercial air or ground transportation is used, the actual cost of transportation to and from the proceeding. Also included are actual costs incurred for meals and necessary lodging.

“Medical examination fees” means actual costs incurred by the board in a physical, mental, chemical abuse, or other impairment-related examination or evaluation of a licensee when the examination or evaluation is conducted pursuant to an order of the board.

“Transcript” means a printed verbatim reproduction of everything said on the record during a hearing or other official proceeding.

“Witness fees” means compensation paid by the board to persons appearing pursuant to subpoena or at the request of the state of Iowa for purposes of providing testimony on the part of the state of Iowa. For the purposes of this rule, compensation shall be the same as outlined in Iowa Code section 622.69 or 622.72 as the case may be.

**51.35(2)** The board may charge a fee not to exceed \$75 for conducting a disciplinary hearing which results in disciplinary action taken against the licensee by the board. In addition to the fee, the board may recover from the licensee costs for the following procedures and personnel:

- a. Transcript.
- b. Witness fees and expenses.
- c. Depositions.
- d. Medical examination fees incurred relating to a person licensed under Iowa Code chapter 147.

**51.35(3)** Fees and costs assessed by the board pursuant to subrule 51.35(2) shall be calculated by the board’s executive director and shall be entered as part of the board’s final disciplinary order. The board’s final disciplinary order shall specify the time period in which the fees and costs shall be paid by the licensee.

**51.35(4)** Fees and costs collected by the board pursuant to subrule 51.35(2) shall be allocated to the expenditure category of the board in which the hearing costs were incurred. The fees and costs shall be considered repayment receipts as defined in Iowa Code section 8.2.

**51.35(5)** Failure of a licensee to pay the fees and costs assessed herein in the time specified in the board’s final disciplinary order shall constitute a violation of a lawful order of the board.

These rules are intended to implement Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202, and Iowa Code sections 272C.5 and 272C.6.

**ARC 8854A****ELDER AFFAIRS  
DEPARTMENT[321]****Notice of Intended Action**

Twenty-five interested persons, a governmental subdivision, an agency or association of 25 or more persons may demand an oral presentation hereon as provided in Iowa Code section 17A.4(1)“b.”

Notice is also given to the public that the Administrative Rules Review Committee may, on its own motion or on written request by any individual or group, review this proposed action under section 17A.8(6) at a regular or special meeting where the public or interested persons may be heard.

Pursuant to the authority of Iowa Code sections 17A.3 and 231.14, the Department of Elder Affairs hereby gives Notice of Intended Action to amend Chapter 2, “Department of Elder Affairs Established,” to rescind Chapter 18, “Declaratory Rulings,” and adopt a new Chapter 18, “Declaratory Orders,” and to adopt Chapter 13, “Contested Cases,” and Chapter 28, “Agency Procedure for Rule Making,” Iowa Administrative Code.

These amendments adopt the Uniform Rules on Agency Procedure in compliance with Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202.

Any interested person may make written suggestions or comments on the proposed amendments or before April 13, 1999. Written comments should be directed to Dr. Judith Anne Conlin, Director, Department of Elder Affairs, Third Floor, Clemens Building, 200 Tenth Street, Des Moines, Iowa 50309-3609.

Oral or written comments may be submitted at a public hearing on these amendments to be held at 10 a.m. on Tuesday, April 13, 1999, North Conference Room, Department of Elder Affairs, Clemens Building, 200 Tenth Street, Des Moines, Iowa 50309-3609. At the hearing, persons will be asked to give their names and addresses for the record and to confine their remarks to the subject of these amendments.

Anyone who wishes to attend the hearing and has special requirements such as hearing, vision or mobility impairments, or other special needs should notify the Department of Elder Affairs no later than 4 p.m. on Friday, April 9, 1999. Notice may be in writing or by telephone to (515)281-4647.

These amendments are intended to implement Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202. The following amendments are proposed.

ITEM 1. Rescind and reserve rule 321—2.7(231).

ITEM 2. Adopt the following new chapter:

CHAPTER 13  
CONTESTED CASES

**321—13.1(17A) Adoption by reference.** The department of elder affairs hereby adopts the contested cases segment of the Uniform Rules on Agency Procedure which are printed in the first volume of the Iowa Administrative Code, with the following amendments:

1. In lieu of the words “(agency name)”, insert “department of elder affairs”.
2. In lieu of the words “(designate official)”, insert “director”.
3. In subrule 7.3(2) delete the words “or by (specify rule number)”.
4. Subrule 13.6(4) is not adopted.

## ELDER AFFAIRS DEPARTMENT[321](cont'd)

5. In lieu of the words "(specify office and address)", insert "Department of Elder Affairs, 200 Tenth Street, Third Floor, Des Moines, Iowa 50309".

6. In lieu of the words "(designate office)", insert "Department of Elder Affairs, 200 Tenth Street, Third Floor, Des Moines, Iowa 50309".

7. In lieu of the words "(agency to designate person to whom violations should be reported)", insert "director".

8. In lieu of the words "(board, commission, director)", insert "director".

9. In lieu of the words "(the agency)", insert "the department of elder affairs".

These rules are intended to implement Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202.

ITEM 3. Rescind Chapter 18 and adopt the following new chapter:

CHAPTER 18  
DECLARATORY ORDERS

**321—18.1(17A) Adoption by reference.** The department of elder affairs hereby adopts the declaratory orders segment of the Uniform Rules on Agency Procedure which are printed in the first volume of the Iowa Administrative Code, with the following amendments:

1. In lieu of the words "(designate agency)", insert "department of elder affairs".

2. In lieu of the words "(designate office)", insert "Department of Elder Affairs, 200 Tenth Street, Third Floor, Des Moines, Iowa 50309".

3. In lieu of the words "(AGENCY NAME)", insert "DEPARTMENT OF ELDER AFFAIRS".

4. In lieu of the words "\_\_\_\_ days (15 or less)", insert "15 days".

5. In lieu of the words "\_\_\_\_ days" in subrule 6.3(1), insert "15 days".

6. In lieu of the words "(designate official by full title and address)", insert "Director, Department of Elder Affairs, 200 Tenth Street, Third Floor, Des Moines, Iowa 50309".

7. In lieu of the words "(specify office and address)", insert "Department of Elder Affairs, 200 Tenth Street, Third Floor, Des Moines, Iowa 50309".

8. In lieu of the words "(agency name)", insert "department of elder affairs".

9. In lieu of the words "(designate agency head)", insert "director".

These rules are intended to implement Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202.

ITEM 4. Adopt the following new chapter:

CHAPTER 28  
AGENCY PROCEDURE FOR RULE MAKING

**321—28.1(17A) Adoption by reference.** The department of elder affairs hereby adopts the agency procedure for rule making segment of the Uniform Rules on Agency Procedure which are printed in the first volume of the Iowa Administrative Code, with the following amendments:

1. In lieu of the words "(commission, board, council, director)", insert "director".

2. In lieu of the words "(specify time period)", insert "one year".

3. In lieu of the words "(identify office and address)", insert "Department of Elder Affairs, 200 Tenth Street, Third Floor, Des Moines, Iowa 50309".

4. In lieu of the words "(designate office and telephone number)", insert "the director's secretary at (515)281-5188".

5. In lieu of the words "(designate office)", insert "Department of Elder Affairs, 200 Tenth Street, Third Floor, Des Moines, Iowa 50309".

6. In lieu of the words "(specify the office and address)", insert "Department of Elder Affairs, 200 Tenth Street, Third Floor, Des Moines, Iowa 50309".

7. In lieu of the words "(agency head)", insert "director".

These rules are intended to implement Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202.

**ARC 8812A**

**ETHICS AND CAMPAIGN  
DISCLOSURE BOARD, IOWA[351]**

**Notice of Intended Action**

Twenty-five interested persons, a governmental subdivision, an agency or association of 25 or more persons may demand an oral presentation hereon as provided in Iowa Code section 17A.4(1)"b."

Notice is also given to the public that the Administrative Rules Review Committee may, on its own motion or on written request by any individual or group, review this proposed action under section 17A.8(6) at a regular or special meeting where the public or interested persons may be heard.

Pursuant to the authority of Iowa Code sections 17A.3 and 68B.32A, the Iowa Ethics and Campaign Disclosure Board proposes to hereby adopt Chapter 14, "Agency Procedure for Rule Making," Iowa Administrative Code.

The Uniform Rules on Agency Procedure relating to agency procedure for rule making are adopted by reference.

Any interested person may make written comments on this proposed adoption of the Uniform Rules on Agency Procedure relating to agency procedure for rule making on or before April 13, 1999. Written comments should be addressed to Kay Williams, Executive Director, Iowa Ethics and Campaign Disclosure Board, 514 E. Locust Street, Suite 104, Des Moines, Iowa 50309.

These rules are intended to implement Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202.

The following amendment is proposed.

Adopt the following new chapter:

CHAPTER 14  
AGENCY PROCEDURE FOR RULE MAKING

**351—14.1(17A) Adoption by reference.** The ethics and campaign disclosure board hereby adopts the agency procedure for rule making segment of the Uniform Rules on Agency Procedure which are printed in the first volume of the Iowa Administrative Code, with the following amendments:

1. In lieu of the words "(commission, board, council, director)", insert "executive director".

2. In lieu of the words "(specify time period)", insert "one year".

3. In lieu of the words "(identify office and address)", insert "Executive Director, Ethics and Campaign Disclosure Board, 514 East Locust Street, Des Moines, Iowa 50309".

4. In lieu of the words "(designate office and telephone number)", insert "the executive director at (515)281-6841".

5. In lieu of the words "(designate office)", insert "Ethics and Campaign Disclosure Board".

## ETHICS AND CAMPAIGN DISCLOSURE BOARD, IOWA[351](cont'd)

6. In lieu of the words "(specify the office and address)", insert "Ethics and Campaign Disclosure Board, 514 East Locust Street, Des Moines, Iowa 50309".

7. In lieu of the words "(agency head)", insert "executive director".

These rules are intended to implement Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202.

**ARC 8814A****HUMAN RIGHTS  
DEPARTMENT[421]****Notice of Intended Action**

Twenty-five interested persons, a governmental subdivision, an agency or association of 25 or more persons may demand an oral presentation hereon as provided in Iowa Code section 17A.4(1)"b."

Notice is also given to the public that the Administrative Rules Review Committee may, on its own motion or on written request by any individual or group, review this proposed action under section 17A.8(6) at a regular or special meeting where the public or interested persons may be heard.

Pursuant to the authority of Iowa Code section 17A.3, the Department of Human Rights gives Notice of Intended Action to amend Chapter 2, "Public Records and Fair Information Practices," and to adopt Chapter 3, "Petitions for Rule Making," Chapter 4, "Agency Procedure for Rule Making," Chapter 5, "Declaratory Orders," and Chapter 6, "Contested Cases," Iowa Administrative Code.

The amendment of Chapter 2 and the adoption of Chapters 3, 4, 5 and 6 will update the department's rules on public records and fair information practices, and provide the department with rules governing procedures for rule making, declaratory orders, and contested cases.

The Seventy-seventh General Assembly in 1998 Iowa Acts, chapter 1202, passed amendments to the Iowa Administrative Procedure Act. The Attorney General's Office drafted amendments to the Uniform Rules on Agency Procedure to implement the amendments to the Iowa Administrative Procedure Act. The department's proposed amendments are based on the changes to the uniform rules.

The department believes these changes will bring the department's rules into compliance with 1998 Iowa Acts, chapter 1202, which becomes effective July 1, 1999.

Any interested person may make written suggestions or comments on the amendments on or before April 13, 1999. Such written suggestions or comments should be directed to the Director, Department of Human Rights, Lucas State Office Building, Des Moines, Iowa 50319.

Persons are also invited to present oral or written suggestions or comments at a public hearing which will be held on April 13, 1999, at 10 a.m. in the Director's Conference Room, Department of Human Rights, Lucas State Office Building, Des Moines, Iowa 50319. At the hearing, persons will be asked to confine their remarks to the subjects of the amendments.

These amendments are intended to implement Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202.

The following amendments are proposed.

ITEM 1. Rescind rule 421—2.1(22) and adopt the following **new** rule in lieu thereof:

**421—2.1(22) Definitions.** As used in this chapter:

"Agency." In lieu of the words "(official or body issuing these rules)", insert the "Department of Human Rights and

the Divisions for Community Action Agencies, Criminal and Juvenile Justice Planning, Deaf Services, Persons with Disabilities, Latino Affairs, Status of Women, and Status of African-Americans."

"Custodian." In lieu of the words "means the agency," insert "means the director of the Department of Human Rights or the administrator of the division within which the records are maintained".

"Routine use" means the disclosure of a record without the consent of the subject or subjects, for a purpose which is compatible with the purpose for which the record was collected. It includes disclosures required to be made by statute other than the public records law, Iowa Code chapter 22.

ITEM 2. Rescind subrule 2.3(1) and adopt the following **new** subrule in lieu thereof:

**2.3(1) Location of record.** In lieu of the words "(insert agency head)" insert "director of the department of human rights, or the administrator of the appropriate division within the department,". In lieu of the words "(insert agency name and address)" insert the "Department of Human Rights or the appropriate division within the department, Lucas State Office Building, Des Moines, Iowa 50319."

ITEM 3. Rescind rule 421—2.6(22) and adopt the following **new** rule in lieu thereof:

**421—2.6(22) Procedure by which additions, dissents or objections may be entered into certain records.** In lieu of the words "(designate office)" insert "department of human rights".

ITEM 4. Adopt the following **new** chapters:

**CHAPTER 3  
PETITIONS FOR RULE MAKING**

**421—3.1(17A) Adoption by reference.** The department of human rights hereby adopts the petitions for rule making segment of the Uniform Rules on Agency Procedure which are printed in the first volume of the Iowa Administrative Code, with the following amendments:

1. In lieu of the words "(designate office)", insert "department of human rights".

2. In lieu of the words "(AGENCY NAME)", insert "DEPARTMENT OF HUMAN RIGHTS".

3. In lieu of the words "(designate official by full title and address)", insert "Director, Department of Human Rights, Lucas State Office Building, Des Moines, Iowa 50319".

These rules are intended to implement Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202.

**CHAPTER 4  
AGENCY PROCEDURE FOR RULE MAKING**

**421—4.1(17A) Adoption by reference.** The department of human rights hereby adopts the agency procedure for rule making segment of the Uniform Rules on Agency Procedure which are printed in the first volume of the Iowa Administrative Code, with the following amendments:

1. In lieu of the words "(commission, board, council, director)", insert "director".

2. In lieu of the words "(specify time period)", insert "one year".

3. In lieu of the words "(identify office and address)", insert "Director, Department of Human Rights, Lucas State Office Building, Des Moines, Iowa 50319".

## HUMAN RIGHTS DEPARTMENT[421](cont'd)

4. In lieu of the words "(designate office and telephone number)", insert "the director at (515)281-7300 voice/tty".

5. In lieu of the words "(designate office)", insert "Department of Human Rights, Lucas State Office Building, Des Moines, Iowa 50319".

6. In lieu of the words "(specify the office and address)", insert "Department of Human Rights, Lucas State Office Building, Des Moines, Iowa 50319".

7. In lieu of the words "(agency head)", insert "director".

These rules are intended to implement Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202.

CHAPTER 5  
DECLARATORY ORDERS

**421—5.1(17A) Adoption by reference.** The department of human rights hereby adopts the declaratory orders segment of the Uniform Rules on Agency Procedure which are printed in the first volume of the Iowa Administrative Code, with the following amendments:

1. In lieu of the words "(designate agency)", insert "department of human rights".

2. In lieu of the words "(designate office)", insert "Department of Human Rights, Lucas State Office Building, Des Moines, Iowa 50319".

3. In lieu of the words "(AGENCY NAME)", insert "DEPARTMENT OF HUMAN RIGHTS".

4. In lieu of the words "\_\_\_\_ days (15 or less)", insert "10 days".

5. In lieu of the words "\_\_\_\_ days" in subrule 6.3(1), insert "20 days".

6. In lieu of the words "(designate official by full title and address)", insert "Director, Department of Human Rights, Lucas State Office Building, Des Moines, Iowa 50319".

7. In lieu of the words "(specify office and address)", insert "Department of Human Rights, Lucas State Office Building, Des Moines, Iowa 50319".

8. In lieu of the words "(agency name)", insert "department of human rights".

9. In lieu of the words "(designate agency head)", insert "director".

These rules are intended to implement Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202.

CHAPTER 6  
CONTESTED CASES

**421—6.1(17A) Adoption by reference.** The department of human rights hereby adopts the contested cases segment of the Uniform Rules on Agency Procedure which are printed in the first volume of the Iowa Administrative Code, with the following amendments:

1. In lieu of the words "(agency name)", insert "department of human rights".

2. In lieu of the words "(designate official)", insert "director".

3. In subrule 7.3(2) delete the words "or by (specify rule number)".

4. In lieu of the words "(agency specifies class of contested case)", insert "division contested cases".

5. In lieu of the words "(specify office and address)", insert "Department of Human Rights, Lucas State Office Building, Des Moines, Iowa 50319".

6. In lieu of the words "(designate office)", insert "department of human rights".

7. In lieu of the words "(agency to designate person to whom violations should be reported)", insert "director".

8. In lieu of the words "(board, commission, director)", insert "director".

9. In lieu of the words "(the agency)", insert "department of human rights".

These rules are intended to implement Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202.

**ARC 8787A**

**HUMAN SERVICES  
DEPARTMENT[441]**

**Notice of Intended Action**

*Twenty-five interested persons, a governmental subdivision, an agency or association of 25 or more persons may demand an oral presentation hereon as provided in Iowa Code section 17A.4(1)"b."*

Notice is also given to the public that the Administrative Rules Review Committee may, on its own motion or on written request by any individual or group, review this proposed action under section 17A.8(6) at a regular or special meeting where the public or interested persons may be heard.

Pursuant to the authority of Iowa Code section 217.6, the Department of Human Services proposes to amend Chapter 95, "Collections," appearing in the Iowa Administrative Code.

This amendment provides a more customer-friendly procedure for the Child Support Recovery Unit (CSRU) to verify whether a child will emancipate prior to the child's eighteenth birthday. Under the current procedure, the obligor and obligee are sent a letter three months prior to the child's emancipation date if CSRU has their addresses and they are requested to submit documentation to establish whether the child is emancipated. The information requested relates to the child's school attendance, marriage, or entry into the military.

Under this amendment, the parents will be asked to complete and sign Form 470-2562, Emancipation Verification, attesting that the information provided is correct. Documentation will not be required unless the CSRU receives conflicting information.

If neither parent returns the form, CSRU will apply the earliest emancipation date established in the support order. For example, an order might read the obligor is to pay support until the child's eighteenth birthday unless the child is in high school, in which case support shall continue until the child's nineteenth birthday. If no reply is received from either parent, CSRU will stop collecting support as of the child's eighteenth birthday.

Consideration will be given to all written data, views, and arguments thereto received by the Bureau of Policy Analysis, Department of Human Services, Hoover State Office Building, Des Moines, Iowa 50319-0114, on or before April 14, 1999.

This amendment is intended to implement Iowa Code sections 252B.3 and 252B.4.

The following amendment is proposed.

Amend 441—Chapter 95 by adopting the following **new** rule:

**441—95.25(252B) Emancipation verification.** The child support recovery unit (CSRU) may verify whether a child

## HUMAN SERVICES DEPARTMENT[441](cont'd)

will emancipate according to the provisions established in the court order prior to the child's eighteenth birthday.

**95.25(1)** Verification process. CSRU shall send Form 470-2562, Emancipation Verification, to the obligor and obligee on a case if CSRU has an address.

**95.25(2)** Return information. The obligor and obligee shall be asked to complete and return the form to the unit. CSRU shall use the information provided by the obligor or obligee to determine if the status of the child indicates that any previously ordered adjustments related to the obligation and a child's emancipation are necessary on the case.

**95.25(3)** Failure to return information. If the obligor and obligee fail to return the questionnaire, CSRU shall apply the earliest emancipation date established in the support order to the case and implement changes in support amounts required in the support order.

**95.25(4)** Conflicting information returned. If conflicting information is returned or made known to CSRU, CSRU shall have the right to verify the child's status through sources other than the obligor and obligee.

This rule is intended to implement Iowa Code sections 252B.3 and 252B.4.

## ARC 8797A

INSPECTIONS AND APPEALS  
DEPARTMENT[481]

## Notice of Intended Action

Twenty-five interested persons, a governmental subdivision, an agency or association of 25 or more persons may demand an oral presentation hereon as provided in Iowa Code section 17A.4(1)"b."

Notice is also given to the public that the Administrative Rules Review Committee may, on its own motion or on written request by any individual or group, review this proposed action under section 17A.8(6) at a regular or special meeting where the public or interested persons may be heard.

Pursuant to the authority of Iowa Code section 10A.104(5), the Department of Inspections and Appeals gives Notice of Intended Action to amend Chapter 1, "Administration," and Chapter 10, "Contested Case Hearings," Iowa Administrative Code.

The proposed amendments implement provisions of 1998 Iowa Acts, chapter 1202, which changed the name of the division that conducts contested case hearings for state agencies. The amendments also add a new rule to establish a code of administrative judicial conduct to govern the conduct of all persons who act as presiding officers under the authority of Iowa Code section 17A.11(1) as amended by 1998 Iowa Acts, chapter 1202, section 15.

Interested persons may make written comments or suggestions on the proposed amendments on or before April 13, 1999. Written materials should be addressed to the Director, Department of Inspections and Appeals, Lucas State Office Building, East 12th and Grand Avenue, Des Moines, Iowa 50319-0083, or faxed to (515)242-6863. E-mail may be sent to [rwalsh@max.state.ia.us](mailto:rwalsh@max.state.ia.us).

These amendments are intended to implement Iowa Code chapters 10A and 17A as amended by 1998 Iowa Acts, chapter 1202.

The following amendments are proposed.

**ITEM 1.** Amend rule **481—1.6(10A)**, catchwords, by striking the words "Appeals and fair" and inserting in lieu thereof the word "Administrative".

**ITEM 2.** Amend rule **481—10.1(10A)** as follows:

Amend the definition of "Division" as follows:

"Division" means the division of ~~appeals and fair administrative~~ hearings in the department of inspections and appeals.

Add the following **new** definitions in alphabetical order:

"Appointing authority" means the appointed or elected chief administrative head of a department, commission, board, independent agency, or statutory office or that person's designee or in the case of gubernatorial appointees, the Governor.

"Personally investigated" means taking affirmative steps to interview witnesses directly or to obtain documents or other information directly. The term "personally investigated" does not include general direction and supervision of assigned investigators, unsolicited receipt of information which is relayed to assigned investigators, review of another person's investigative work product in the course of determining whether there is probable cause to initiate a proceeding, or exposure to factual information while performing other agency functions, including fact gathering for purposes other than investigation of the matter which culminates in a contested case.

"Presiding officer" means, as used in the code of administrative judicial conduct, all persons who preside in contested case proceedings under Iowa Code section 17A.11(1) as amended by 1998 Iowa Acts, chapter 1202, section 15.

**ITEM 3.** Amend 481—Chapter 10 by adopting **new** rule 481—10.29(10A) as follows:

**481—10.29(10A) Code of administrative judicial conduct.** The code of administrative judicial conduct is designed to govern the conduct, in relation to their adjudicative functions in contested cases, of all persons who act as presiding officers under the authority of Iowa Code section 17A.11(1) as amended by 1998 Iowa Acts, chapter 1202, section 15. The canons are rules of reason. The canons should be applied consistent with constitutional requirements, statutes, administrative rules, and decisional law and in the context of all relevant circumstances. The canons must be harmonized with the dictates of the administrative process as established by the legislature. This code is to be construed so as to promote the essential independence of presiding officers in making judicial decisions.

Whether disciplinary action is appropriate, and the degree of discipline to be imposed, should be determined by the appointing authority through a reasonable and reasoned application of the text and should depend on such factors as the seriousness of the transgression, whether there is a pattern of improper activity, and the effect of improper activity on others or on the administrative system. This code is not designed or intended as a basis for civil liability or criminal prosecution.

**10.29(1) Canon 1.** A presiding officer should uphold the integrity and independence of the administrative judiciary.

a. An independent and honorable administrative judiciary is indispensable to justice in society.

b. A presiding officer should participate in establishing, maintaining, and enforcing high standards of conduct and should personally observe those standards so that the integrity and independence of the administrative judiciary will be preserved.

c. The provisions of this code are to be construed and applied to further that objective.

## INSPECTIONS AND APPEALS DEPARTMENT[481](cont'd)

**10.29(2) Canon 2.** A presiding officer should avoid impropriety and the appearance of impropriety in all adjudicative functions in contested cases.

a. A presiding officer should respect and comply with the law and at all times should act in a manner that promotes public confidence in the integrity and impartiality of the administrative judiciary.

b. A presiding officer should not allow family, social, political, or other relationships to influence the presiding officer's judicial conduct or judgment. This provision should not be construed as prohibiting the development of public policy by contested case adjudication. A presiding officer should not lend the prestige of the office to advance the private interests of the presiding officer or others; nor should a presiding officer convey or permit others to convey the impression that they are in a special position to influence the presiding officer.

c. A presiding officer should not hold membership in any organization that the presiding officer knows practices invidious discrimination on the basis of race, sex, religion or national origin.

**10.29(3) Canon 3.** A presiding officer should perform the duties of the office impartially and diligently.

a. Adjudicative responsibilities. A presiding officer in the performance of adjudicative duties in contested case proceedings should follow these standards:

(1) A presiding officer should be faithful to the law, unswayed by partisan interests, public clamor, or fear of criticism.

(2) A presiding officer should maintain order and decorum in proceedings before the presiding officer.

(3) A presiding officer should be patient, dignified, and courteous to litigants, witnesses, attorneys, representatives, and others with whom the presiding officer deals in an official capacity, and should require similar conduct of attorneys, representatives, staff members and others subject to the presiding officer's direction and control.

(4) A presiding officer should not, in the performance of adjudicative duties by words or conduct, manifest bias or prejudice, including but not limited to bias or prejudice based upon sex, race, national origin or ethnicity and should not permit staff and others subject to the presiding officer's direction and control to do so.

(5) A presiding officer should accord to all persons who are legally interested in a proceeding, or their representatives, full right to be heard according to law, and except as authorized by law, neither initiate nor consider ex parte communications as to substantive matters concerning a pending or impending proceeding.

(6) A presiding officer should dispose of all adjudicative matters promptly, efficiently and fairly.

(7) A presiding officer should abstain from public comment about a pending or impending contested case proceeding that might reasonably be expected to affect the outcome or impair the fairness of the proceeding, and should require similar abstention by agency personnel subject to the presiding officer's direction and control. This subparagraph does not prohibit a presiding officer from making public statements in the course of official duties or from explaining for public information the hearing procedures of agencies.

(8) A presiding officer should not disclose or use, for any purpose unrelated to adjudicative duties, nonpublic information acquired in an adjudicative capacity.

(9) A presiding officer should report any violation of this code to the appropriate authority for any disciplinary proceedings provided by law.

b. Disqualification. A presiding officer or other person should withdraw from participation in the making of any proposed or final decision in a contested case if that person:

(1) Has a personal bias or prejudice concerning a party or a representative of a party;

(2) Has personally investigated, prosecuted or advocated, in connection with that case, the specific controversy underlying that case, or another pending factually related contested case, or a pending factually related controversy that may culminate in a contested case involving the same parties;

(3) Is subject to the authority, direction or discretion of any person who has personally investigated, prosecuted or advocated in connection with that contested case, the specific controversy underlying that contested case, or a pending factually related contested case or controversy involving the same parties;

(4) Has acted as counsel to any person who is a private party to that proceeding within the past two years;

(5) Has a personal financial interest in the outcome of the case or any other significant personal interest that could be substantially affected by the outcome of the case;

(6) Has a spouse or relative within the third degree of relationship that:

1. Is a party to the case, or an officer, director or trustee of a party;

2. Is an attorney in the case;

3. Is known to have an interest that could be substantially affected by the outcome of the case; or

4. Is likely to be a material witness in the case; or

(7) Has any other legally sufficient cause to withdraw from participation in the decision making in that case.

c. Disclosure on record. In a situation where a presiding officer knows of information which might reasonably be deemed to be a basis for disqualification and decides voluntary withdrawal is unnecessary, the presiding officer shall disclose the relevant information on the record and shall state reasons why voluntary withdrawal is unnecessary.

**10.29(4) Canon 4.** A presiding officer should regulate extrajudicial activities to minimize the risk of conflict with judicial duties.

In general, a presiding officer should conduct all of the presiding officer's extrajudicial activities so that they do not:

1. Cast reasonable doubt on the presiding officer's capacity to act impartially as a judge;

2. Create the appearance of impropriety or demean the adjudicative office; or

3. Interfere with the proper performance of adjudicative duties.

**ARC 8798A**

## INSPECTIONS AND APPEALS DEPARTMENT[481]

### Notice of Intended Action

Twenty-five interested persons, a governmental subdivision, an agency or association of 25 or more persons may demand an oral presentation hereon as provided in Iowa Code section 17A.4(1)"b."

Notice is also given to the public that the Administrative Rules Review Committee may, on its own motion or on written request by any individual or group, review this proposed action under section 17A.8(6) at a regular or special meeting where the public or interested persons may be heard.

Pursuant to the authority of Iowa Code section 10A.104(5), the Department of Inspections and Appeals

## INSPECTIONS AND APPEALS DEPARTMENT[481](cont'd)

gives Notice of Intended Action to amend Chapter 2, "Petitions for Rule Making," and Chapter 4, "Agency Procedure for Rule Making," and to rescind Chapter 3, "Declaratory Rulings," and to adopt a new Chapter 3, "Declaratory Orders," Iowa Administrative Code.

The proposed amendments bring the Department's rules on administrative rule making and declaratory orders into conformance with 1998 Iowa Acts, chapter 1202, which amended the Iowa Administrative Procedure Act.

The Department's proposed amendments to its rules are based on the amendments to the Uniform Rules on Agency Procedure drafted by a task force from the Attorney General's Office and published in the Iowa Administrative Bulletin on February 24, 1999.

Interested persons may make written comments or suggestions on the proposed amendments on or before April 13, 1999. Written materials should be addressed to the Director, Department of Inspections and Appeals, Lucas State Office Building, 321 East 12th Street, Des Moines, Iowa 50319-0083, or faxed to (515)242-6863. E-mail may be sent to [rwalsh@max.state.ia.us](mailto:rwalsh@max.state.ia.us).

These amendments are intended to implement Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202, and Iowa Code section 25B.6.

The following amendments are proposed.

ITEM 1. Amend the implementation clause at the end of **481—Chapter 2** as follows:

These rules are intended to implement ~~1986 Iowa Acts, chapter 1245, section 504.~~ *Iowa Code section 17A.7 as amended by 1998 Iowa Acts, chapter 1202, section 11.*

ITEM 2. Rescind 481—Chapter 3 and adopt the following **new** chapter in lieu thereof:

**CHAPTER 3  
DECLARATORY ORDERS**

The department of inspections and appeals adopts the declaratory orders segment of the Uniform Rules on Agency Procedure which is printed in the first volume of the Iowa Administrative Code with the following amendments.

**481—3.1(17A) Petition for declaratory order.** In lieu of the words "(designate agency)", insert "department". In lieu of the words "(designate office)", insert "the Director's Office, Department of Inspections and Appeals, Lucas State Office Building, 321 East 12th Street, Des Moines, Iowa 50319-0083". In lieu of the words "(AGENCY NAME)", the heading on the petition form should read:

**BEFORE THE DEPARTMENT OF  
INSPECTIONS AND APPEALS**

**481—3.2(17A) Notice of petition.** In lieu of the words "\_\_\_\_ days (15 or less)", insert "15 days". In lieu of the words "(designate agency)", insert "department".

**481—3.3(17A) Intervention.**

**3.3(1)** In lieu of the words "within \_\_\_\_ days", insert "within 15 days". Strike the words "(after time for notice under X.2(17A))". In lieu of the number "X.8(17A)", insert "3.8(17A)".

**3.3(2)** In lieu of the words "(designate agency)", insert "the department".

**3.3(3)** In lieu of the words "(designate office)", insert "the Director's Office, Department of Inspections and Appeals, Lucas State Office Building, 321 East 12th Street, Des Moines, Iowa 50319-0083". In lieu of the words "(designate

agency)", insert "department". In lieu of the words "(AGENCY NAME)", the heading on the petition form should read:

**BEFORE THE DEPARTMENT OF  
INSPECTIONS AND APPEALS**

**481—3.4(17A) Briefs.** In lieu of the words "(designate agency)", insert "department".

**481—3.5(17A) Inquiries.** In lieu of the words "(designate official by full title and address)", insert "the Director, Department of Inspections and Appeals, Lucas State Office Building, 321 East 12th Street, Des Moines, Iowa 50319-0083".

**481—3.6(17A) Service and filing of petitions and other papers.**

**3.6(2)** In lieu of the words "(specify office and address)", insert "the Director's Office, Department of Inspections and Appeals, Lucas State Office Building, 321 East 12th Street, Des Moines, Iowa 50319-0083". In lieu of the words "(agency name)", insert "department".

**3.6(3)** In lieu of the words "(uniform rule on contested cases X.12(17A))", insert "rule 481—10.12(17A)".

**481—3.7(17A) Consideration.** In lieu of the words "(designate agency)", insert "department".

**481—3.8(17A) Action on petition.**

**3.8(1)** In lieu of the words "(designate agency head)", insert "director".

**3.8(2)** In lieu of the words "(contested case uniform rule X.2(17A))", insert "rule 481—10.1(10A)".

**481—3.9(17A) Refusal to issue order.**

**3.9(1)** In lieu of the words "(designate agency)", insert "department".

**481—3.12(17A) Effect of a declaratory order.** In lieu of the words "(designate agency)", insert "department".

These rules are intended to implement Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202, section 13.

ITEM 3. Amend 481—Chapter 4 as follows:

Amend rule 481—4.5(17A) by adopting the following **new** subrule:

**4.5(5) Accessibility.** In lieu of the words "(designate office and telephone number)", insert "the administrative services bureau at (515)281-6407".

Amend rule 481—4.6(17A) as follows:

**481—4.6(17A) Regulatory flexibility analysis.**

~~4.6(3)~~ **4.6(2) Mailing list.** In lieu of the words "(designate office)", insert "Director's Office, Department of Inspections and Appeals, Lucas State Office Building, Des Moines, Iowa 50319".

Adopt **new** rule 481—4.10(17A) as follows:

**481—4.10(17A) Exemptions from public rule-making procedures.**

**4.10(2)** Categories exempt. In lieu of the words "(List here narrowly drawn classes of rules where such an exemption is justified and a brief statement of the reasons for exempting each of them)", insert the following:

"a. Rules which are mandated by federal law or regulation in any situation where the department has no option but to adopt specified rules or where federal funding is contingent upon the adoption of the rules;

INSPECTIONS AND APPEALS DEPARTMENT[481](cont'd)

- b. Rules which implement recent legislation when a statute provides for an effective date which does not allow for the usual notice and public participation requirements;
- c. Rules which confer a benefit or remove a restriction on licensees, the public or some segment of the public;
- d. Rules which are necessary because of imminent peril to the public health, safety or welfare; and
- e. Nonsubstantive rules intended to correct typographical errors, incorrect citations, or other errors in existing rules."

Amend the implementation clause at the end of the chapter as follows:

These rules are intended to implement Iowa Code ~~section 17A.4~~ chapter 17A as amended by 1998 Iowa Acts, chapter 1202, and Iowa Code ~~chapter 10A~~ section 25B.6.

**ARC 8836A**

**INSURANCE DIVISION[191]**

**Notice of Intended Action**

Twenty-five interested persons, a governmental subdivision, an agency or association of 25 or more persons may demand an oral presentation hereon as provided in Iowa Code section 17A.4(1)"b."

Notice is also given to the public that the Administrative Rules Review Committee may, on its own motion or on written request by any individual or group, review this proposed action under section 17A.8(6) at a regular or special meeting where the public or interested persons may be heard.

Pursuant to the authority of Iowa Code sections 321I.7, 502.607, 502A.17, 505.8, 523A.16, 523B.10, 523C.10, 523D.10, 523E.16, and 566A.14, the Insurance Division hereby gives Notice of Intended Action to rescind Chapter 2, "Declaratory Rulings," Chapter 3, "Administrative Hearings of Contested Cases," and Chapter 4, "Petition for Rule Making," Iowa Administrative Code, and adopt Chapter 2, "Declaratory Orders," Chapter 3, "Contested Cases," and Chapter 4, "Agency Procedure for rule Making."

These rules set forth procedures governing various administrative proceedings. They are being promulgated in response to amendments to Iowa Code chapter 17A, the Iowa Administrative Procedure Act, in 1998 Iowa Acts, chapter 1202.

Any interested person may make written suggestions or comments on these proposed rules prior to April 16, 1999. These written materials may be mailed to Craig A. Goettsch, Iowa Securities Bureau, 340 E. Maple Street, Des Moines, Iowa 50319-0066, or may be transmitted via facsimile to (515) 281-3059.

A public hearing will be held on April 16, 1999, at 10 a.m. at the Iowa Insurance Division, 330 E. Maple Street, Des Moines, Iowa 50319-0065.

These amendments are intended to implement Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202. The following amendments are proposed.

ITEM 1. Rescind 191—Chapter 2 and adopt the following new chapter:

**CHAPTER 2  
DECLARATORY ORDERS**

**191—2.1(17A) Petition for declaratory order.**

2.1(1) Any person or agency may file a petition with the insurance division for a declaratory order as to the applicability to specified circumstances of a statute, rule or order within the primary jurisdiction of the division, at the address

disclosed in rule 191—1.2(502,505). A petition is deemed filed when it is received. The division shall provide petitioner with a file-stamped copy of the petition if petitioner provides the agency an extra copy for this purpose. The petition must be typewritten or legibly handwritten in ink and must substantially conform to the following form:

**BEFORE THE INSURANCE DIVISION OF THE STATE OF IOWA**

Petition by (Name of Petitioner) for a Declaratory Order on (Cite provisions of law involved).

} **PETITION FOR  
DECLARATORY  
ORDER**

2.1(2) The petition shall provide the following information:

a. A clear and concise statement of all relevant facts upon which the order is requested.

b. A citation and the relevant language of the specific statutes, rules, policies, decisions, or orders, whose applicability or interpretation is questioned, and any other relevant law.

c. The questions petitioner wants answered, stated clearly and concisely.

d. The answers to the questions desired by petitioner and a summary of the reasons urged by petitioner in support of those answers.

e. The reasons for requesting the declaratory order and disclosure of petitioner's interest in the outcome.

f. A statement indicating whether petitioner is currently a party to another proceeding involving the questions at issue and whether, to petitioner's knowledge, those questions have been decided by, are pending determination by, or are under investigation by, any governmental entity.

g. Any request by petitioner for a meeting provided for by rule 2.7(17A).

The petition must be dated and signed by petitioner or petitioner's representative. It must also include the name, mailing address, and telephone number of petitioner and petitioner's representative, and a statement indicating the person to whom communications concerning the petition should be directed.

**191—2.2(17A) Notice of petition.** Within seven days after receipt of a petition for a declaratory order, the insurance division shall give notice of the petition to all persons not served by petitioner pursuant to rule 2.6(17A) to whom notice is required by any provision of law. The division may also give notice to any other persons.

**191—2.3(17A) Intervention.** A person may file a petition for intervention at any time prior to issuance of an order and may be allowed to intervene in a proceeding for a declaratory order at the discretion of the insurance division.

**191—2.4(17A) Briefs.** Petitioner or any intervenor shall file a brief in support of the position urged.

**191—2.5(17A) Inquiries.** Inquiries concerning the status of a declaratory proceeding may be made to the insurance division at the address disclosed in rule 191—1.2(502,505).

**191—2.6(17A) Service and filing of petitions and other papers.**

2.6(1) Every petition for declaratory order, petition for intervention, brief, or other paper filed in a proceeding for a declaratory order shall be served upon each of the parties of

## INSURANCE DIVISION[191](cont'd)

record to the proceeding. The party filing a document is responsible for service.

**2.6(2)** All petitions for declaratory orders, petitions for intervention, briefs, or other papers in a proceeding for a declaratory order shall be filed with the insurance division at the address disclosed in rule 191—1.2(502,505). All petitions, briefs, or other papers required to be served upon a party shall be filed simultaneously with the division.

**2.6(3)** Method of service, time of filing, and proof of mailing shall be as provided by rule 3.12(17A).

**191—2.7(17A) Consideration.** Upon request by petitioner, the insurance division must schedule a brief and informal meeting between the original petitioner, all intervenors, and the commissioner or a member of the commissioner's staff, to discuss the questions raised.

**191—2.8(17A) Action on petition.**

**2.8(1)** Within the time allowed by 1998 Iowa Acts, chapter 1202, section 13(5), after receiving a petition for a declaratory order, the insurance division shall take action on the petition as required by 1998 Iowa Acts, chapter 1202, section 13(5).

**2.8(2)** The date of issuance of an order is as defined in rule 3.2(17A).

**191—2.9(17A) Refusal to issue order.**

**2.9(1)** The insurance division shall not issue a declaratory order where prohibited by 1998 Iowa Acts, chapter 1202, section 13(1), and may refuse to issue a declaratory order on some or all questions raised for the following reasons:

a. The petition does not substantially comply with the required form.

b. The petition does not contain facts sufficient to demonstrate that petitioner will be aggrieved or adversely affected by failure of the division to issue an order.

c. The agency does not have jurisdiction over the questions presented in the petition.

d. The questions presented by the petition are also presented in a current rule making, contested case, or other agency or judicial proceeding, that may definitively resolve them.

e. The questions presented by the petition would more properly be resolved in a different type of proceeding or by another body with jurisdiction over the matter.

f. The facts or questions presented in the petition are unclear, overbroad, insufficient, or otherwise inappropriate as a basis upon which to issue an order.

g. There is no need to issue an order because the questions raised in the petition have been settled due to a change in circumstances.

h. The petition is not based upon facts calculated to aid in the planning of future conduct but is, instead, based solely upon prior conduct in an effort to establish the effect of that conduct or to challenge an agency decision already made.

i. The petition requests a declaratory order that would necessarily determine the legal rights, duties, or responsibilities of other persons who have not joined in the petition, intervened separately, or filed a similar petition and whose position on the questions presented may fairly be presumed to be adverse to that of petitioner.

j. Petitioner requests the division to determine whether a statute is unconstitutional on its face.

**2.9(2)** A refusal to issue a declaratory order must indicate the specific grounds for refusal and constitutes final agency action on the petition.

**2.9(3)** Refusal to issue a declaratory order pursuant to this provision does not preclude filing of a new petition that seeks to eliminate the grounds for refusal to issue a ruling.

**191—2.10(17A) Contents of declaratory order—effective date.** In addition to the ruling itself, a declaratory order must contain the date of its issuance, the name of petitioner and all intervenors, the specific statutes, rules, policies, decisions, or orders involved, the particular facts upon which it is based, and the reasons for its conclusion.

A declaratory order is effective on the date of issuance.

**191—2.11(17A) Copies of orders.** A copy of all orders issued in response to a petition for a declaratory order shall be mailed promptly to the original petitioner and all intervenors.

**191—2.12(17A) Effect of a declaratory order.** A declaratory order has the same status and binding effect as a final order issued in a contested case proceeding. It is binding on the insurance division, petitioner, and any intervenors and is applicable only in circumstances where the relevant facts and the law involved are indistinguishable from those on which the order was based. As to all other persons, a declaratory order serves only as precedent and is not binding on the division. Issuance of a declaratory order constitutes final agency action on the petition.

These rules are intended to implement Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202.

ITEM 2. Rescind 191—Chapter 3 and adopt the following new chapter:

CHAPTER 3  
CONTESTED CASES

**191—3.1(17A) Scope and applicability.** This chapter applies to contested case proceedings conducted by the insurance division.

**191—3.2(17A) Definitions.** Except where otherwise specifically defined by law or the context otherwise requires:

“Commissioner” means the commissioner of insurance or the commissioner's designee.

“Contested case” means a proceeding defined by Iowa Code section 17A.2(5), and includes any matter defined as a no factual dispute contested case under 1998 Iowa Acts, chapter 1202, section 14.

“Issuance” means the date of mailing of a decision or order or date of delivery if service is by other means unless another date is specified in the order.

“License” means the whole or a part of any permit, certificate, approval, registration, charter or similar form of permission required by statute.

“Party” means each person or agency named or admitted as a party or properly seeking and entitled as of right to be admitted as a party.

“Presiding officer” means the commissioner, the commissioner's designee or an administrative law judge from the department of inspections and appeals.

“Proposed decision” means the presiding officer's recommended findings of fact, conclusions of law, decision, and order in a contested case in which the commissioner did not preside.

**191—3.3(17A) Time requirements.**

**3.3(1)** Time shall be computed as provided in Iowa Code section 4.1(34).

**3.3(2)** For good cause, the presiding officer may extend or shorten the time to take any action, except as precluded by

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statute. Except for good cause stated in the record, before extending or shortening the time to take any action, the presiding officer shall afford all parties an opportunity to be heard or to file written arguments.

**191—3.4(17A) Requests for contested case proceeding.**

Any person claiming an entitlement to a contested case proceeding shall file a written request for such a proceeding within the time specified by the particular rules or statutes governing the subject matter or, in the absence of such law, the time specified in the agency action in question. The request shall be filed with the insurance division, at the address disclosed in rule 191—1.2(502,505).

The request for a contested case proceeding shall state the name and address of the requester, identify the specific agency action which is disputed and, where the requester is represented by a lawyer, identify the provisions of law or precedent requiring or authorizing a contested case proceeding in the particular circumstances involved, and shall include a short and plain statement of the issues of material fact in dispute.

**191—3.5(17A) Notice of hearing.**

**3.5(1)** Delivery of the notice of hearing constitutes commencement of the contested case proceeding. Delivery may be executed by:

- a. Personal service as provided in the Iowa Rules of Civil Procedure; or
- b. Certified mail, return receipt requested; or
- c. First-class mail; or
- d. Publication, as provided in the Iowa Rules of Civil Procedure; or
- e. Restricted certified mail to licensees as provided in Iowa Code section 17A.18.

**3.5(2)** The notice of hearing shall contain the following information:

- a. A statement of the time, place, and nature of the hearing;
- b. A statement of the legal authority and jurisdiction under which the hearing is to be held;
- c. A reference to the particular sections of the statutes and rules involved;
- d. A short and plain statement of the matters asserted. If the insurance division or other party is unable to state the matters in detail at the time the notice is served, the initial notice may be limited to a statement of the issues involved. Thereafter, upon written application, a more definite and detailed statement shall be furnished;
- e. Identification of all parties including the name, address and telephone number of the person who will act as advocate for the division and of parties' counsel where known;
- f. Reference to the procedural rules governing conduct of the contested case proceeding;
- g. Reference to the procedural rules governing informal settlement;
- h. Identification of the presiding officer and address, if known. If not known, a description of who generally will serve as presiding officer; and
- i. Notification of the time period in which a party may request, under 1998 Iowa Acts, chapter 1202, section 15(1), and rule 3.6(17A), that the presiding officer be an administrative law judge.

**191—3.6(17A) Presiding officer.**

**3.6(1)** Any party wishing to request that the presiding officer assigned to render a proposed decision be an administrative law judge employed by the department of inspections and appeals must file a written request within 20 days after

service of a notice of hearing identifying or describing the presiding officer as the commissioner or members of the commissioner's staff.

**3.6(2)** The commissioner may deny the request only upon a finding that one or more of the following apply:

- a. Neither the commissioner nor any designee under whose authority the contested case is to take place is a named party to the proceeding or a real party in interest to that proceeding.
- b. There is a compelling need to expedite issuance of a final decision in order to protect the public health, safety, or welfare.
- c. An administrative law judge with the qualifications identified in subrule 3.6(4) is unavailable to hear the case within a reasonable time.
- d. The case involves significant policy issues of first impression that are inextricably intertwined with the factual issues presented.
- e. The demeanor of the witnesses is likely to be dispositive in resolving the disputed factual issues.
- f. Funds are unavailable to pay the costs of an administrative law judge and an interagency appeal.
- g. The request was not timely filed.
- h. The request is not consistent with a specified statute.
- i. A statute requires the commissioner or designee to serve as presiding officer.
- j. The contested case arises from matters asserted pursuant to Iowa Code chapters 507A, 507B, 508B, 515G and 521A.

**3.6(3)** The commissioner or designee shall issue a written ruling specifying the grounds for its decision within 20 days after a request for an administrative law judge is filed. If the ruling is contingent upon the availability of an administrative law judge with the qualifications identified in subrule 3.6(4), the parties shall be notified at least ten days prior to hearing if a qualified administrative law judge will not be available.

**3.6(4)** An administrative law judge assigned to act as presiding officer in insurance and securities matters shall have the following technical expertise unless waived by the agency: be admitted to practice law before the courts of the state of Iowa and have experience in securities or insurance matters, or other qualifying experience.

**3.6(5)** Except as provided otherwise by another provision of law, all rulings by an administrative law judge acting as presiding officer are subject to appeal to the commissioner. A party must seek any available intra-agency appeal in order to exhaust adequate administrative remedies.

**191—3.7(17A) Waiver of procedures.** Unless otherwise precluded by law, the parties in a contested case proceeding may waive any provision of this chapter. However, the insurance division may exercise discretion to refuse to give effect to such a waiver when the waiver is to be inconsistent with the public interest.

**191—3.8(17A) Telephone proceedings.** The presiding officer may resolve preliminary procedural motions by telephone conference in which all parties have been afforded notice and an opportunity to participate. Other telephone proceedings may be held upon request of any party and with the approval of the presiding officer. The presiding officer will determine the location of the parties and witnesses for telephone hearings. The convenience of the witnesses or parties, as well as the nature of the case, will be considered when location is chosen.

**191—3.9(17A) Disqualification.**

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**3.9(1)** A presiding officer or other person shall withdraw from participation in the making of any proposed or final decision in a contested case if that person:

a. Has a personal bias or prejudice concerning a party or a representative of a party;

b. Has personally investigated, prosecuted or advocated in connection with that case, the specific controversy underlying that case, another factually related contested case with common disputed facts, or a pending controversy with common disputed facts that may culminate in a contested case involving the same parties;

c. Is subject to the authority, direction or discretion of any person who has personally investigated, prosecuted or advocated in connection with that contested case, the specific controversy underlying that contested case, or a factually related contested case with common disputed facts or controversy involving the same parties;

d. Has acted as counsel to any person who is a private party to that proceeding within the past two years;

e. Has a personal financial interest in the outcome of the case or any other significant personal interest that could be substantially affected by the outcome of the case;

f. Has a spouse or relative within the third degree of relationship that is (1) a party to the case, or an officer, director or trustee of a party; (2) a lawyer in the case; (3) known to have an interest that could be substantially affected by the outcome of the case; or (4) likely to be a material witness in the case; or

g. Has any other legally sufficient cause to withdraw from participation in the decision making in the case.

**3.9(2)** The term "personally investigated" means taking affirmative steps to interview witnesses directly or to obtain documents or other information directly. The term "personally investigated" does not include general direction and supervision of assigned investigators, unsolicited receipt of information which is relayed to assigned investigators, review of another person's investigative work product in the course of determining whether there is probable cause to initiate a proceeding, or exposure to factual information while performing other agency functions, including fact gathering for purposes other than investigation of the matter which culminates in a contested case. Factual information relevant to the merits of a contested case received by a person who later serves as presiding officer in that case shall be disclosed if required by Iowa Code section 17A.17 as amended by 1998 Iowa Acts, chapter 1202, section 19, and subrules 3.9(3) and 3.23(9).

**3.9(3)** In a situation where a presiding officer or other person knows of information which might reasonably be deemed to be a basis for disqualification and decides voluntary withdrawal is unnecessary, that person shall submit the relevant information for the record by affidavit and shall provide for the record a statement of the reasons for the determination that withdrawal is unnecessary.

**3.9(4)** To request disqualification of a presiding officer, a party shall file a motion supported by an affidavit pursuant to 1998 Iowa Acts, chapter 1202, section 19(7). The motion shall be filed as soon as practical after the reason alleged in the motion becomes known to the party. If, during the course of the hearing, a party first becomes aware of evidence of bias or other grounds for disqualification, the party may move for disqualification but shall establish the grounds by the introduction of evidence into the record.

If the presiding officer determines that disqualification is appropriate, the presiding officer shall withdraw. If the presiding officer determines that withdrawal is not required, the

presiding officer shall enter an order to that effect. A party requesting disqualification may seek an interlocutory appeal under rule 3.25(17A) and seek a stay under rule 3.29(17A).

**191—3.10(17A) Consolidation—severance.**

**3.10(1)** The presiding officer may consolidate contested case proceedings where (a) the matters at issue involve common parties or common questions of fact or law; (b) consolidation would expedite and simplify consideration of the issues involved; and (c) consolidation would not adversely affect the rights of any of the parties to those proceedings.

**3.10(2)** The presiding officer may, for good cause shown, order any contested case proceedings or portions thereof severed.

**191—3.11(17A) Pleadings.**

**3.11(1)** Pleadings may be required by rule, by the notice of hearing, or by order of the presiding officer.

**3.11(2)** Petition requirements:

a. Any petition required in a contested case proceeding shall be filed within 20 days of delivery of the notice of hearing or subsequent order of the presiding officer, unless otherwise ordered.

b. A petition shall state in separately numbered paragraphs the following:

(1) The persons or entities on whose behalf the petition is filed;

(2) The particular provisions of statutes and rules involved;

(3) The relief demanded and the facts and law relied upon for such relief; and

(4) The name, address and telephone number of petitioner and petitioner's attorney, if any.

**3.11(3)** An answer shall be filed within 20 days of service of the petition unless otherwise ordered. A party may move to dismiss or apply for a more definite and detailed statement when appropriate.

a. An answer shall show on whose behalf it is filed and specifically admit, deny, or otherwise answer all material allegations of the pleading to which it responds. It shall state any facts deemed to show an affirmative defense and contain as many additional defenses as the pleader may claim.

b. An answer shall state the name, address and telephone number of the person filing the answer, the person or entity on whose behalf it is filed, and the attorney representing that person, if any.

c. Any allegation in the petition not denied in the answer is considered admitted. The presiding officer may refuse to consider any defense not raised in the answer which could have been raised on the basis of facts known when the answer was filed if any party would be prejudiced.

**3.11(4)** Any notice of hearing, petition, or other charging document may be amended before a responsive pleading has been filed. Amendments to pleadings after a responsive pleading has been filed and to an answer may be allowed with the consent of the other parties or in the discretion of the presiding officer who may impose terms or grant a continuance.

**191—3.12(17A) Service and filing of pleadings and other papers.**

**3.12(1)** Every pleading, motion, document, or other paper filed in a contested case proceeding and every paper relating to discovery in such a proceeding shall be served upon each of the parties of record to the proceeding, including the person designated as advocate or prosecutor for the insurance division, at the time of filing. Except for the initial notice of hearing and an application for rehearing as provided in Iowa

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Code section 17A.16(2), the party filing a document is responsible for service on all parties.

**3.12(2)** Service upon a party represented by an attorney shall be made upon the attorney unless otherwise ordered. Service is made by delivery or by mailing a copy to the person's last-known address. Service by mail is complete upon mailing, except where otherwise specifically provided by statute, rule, or order.

**3.12(3)** After the notice of hearing, all pleadings, motions, documents or other papers in a contested case proceeding shall be filed with the presiding officer.

**3.12(4)** Except where otherwise provided by law, a document is deemed filed at the time it is delivered to the presiding officer, delivered to an established courier service for immediate delivery to that office, or mailed by first-class mail or state interoffice mail to that office, so long as there is proof of mailing.

**3.12(5)** Proof of mailing includes either: a legible United States Postal Service postmark on the envelope, a certificate of service, a notarized affidavit, or a certification in substantially the following form:

I certify under penalty of perjury and pursuant to the laws of Iowa that, on (date of mailing), I mailed copies of (describe document) addressed to the Insurance Division at the address disclosed in 191—1.2(502,505) and to the names and addresses of the parties listed below by depositing the same in (a United States post office mailbox with correct postage properly affixed or state interoffice mail).

(Date) (Signature)

**191—3.13(17A) Discovery.**

**3.13(1)** Where statutory time limitations permit, discovery may be conducted as permitted by the Iowa Rules of Civil Procedure. Unless lengthened or shortened by these rules or by order of the presiding officer, time periods for compliance with discovery shall be as provided in the Iowa Rules of Civil Procedure.

**3.13(2)** Any motion relating to discovery shall allege that the moving party has previously made a good-faith attempt to resolve the discovery issues involved with the opposing party. Motions in regard to discovery shall be ruled upon by the presiding officer. Opposing parties shall be afforded the opportunity to respond within ten days of the filing of the motion unless the time is shortened as provided in subrule 3.13(1). The presiding officer may rule on the basis of the written motion and any response, or may order argument on the motion.

**191—3.14(17A) Subpoenas.**

**3.14(1)** An agency subpoena shall be issued to a party on request. Such a request must be in writing. In the absence of good cause for permitting later action, a request for a subpoena must be received at least three days before the scheduled hearing. The request shall include the name, address, and telephone number of the requesting party.

**3.14(2)** Except to the extent otherwise provided by law, parties are responsible for service of their own subpoenas and payment of witness fees and mileage expenses.

**3.14(3)** The presiding officer may quash or modify a subpoena upon motion as provided in the Iowa Rules of Civil Procedure. A motion to quash or modify a subpoena shall be promptly set for hearing.

**191—3.15(17A) Motions.**

**3.15(1)** No technical form for motions is required. However, prehearing motions must be in writing, state the grounds for relief and relief sought.

**3.15(2)** Any party may file a written response to a motion within ten days after the motion is served, unless the time period is extended or shortened by the presiding officer. In ruling on a motion, the presiding officer may consider the motion unresisted, if no response is timely filed.

**3.15(3)** The presiding officer may schedule oral argument on any motion.

**3.15(4)** Motions pertaining to the hearing, except motions for summary judgment, must be filed and served at least ten days prior to the date of hearing unless there is good cause for permitting later action or the time for such action is lengthened or shortened by an order of the presiding officer.

**3.15(5)** Motions for summary judgment shall comply with the requirements of Iowa Rule of Civil Procedure 237 and shall be subject to disposition according to the requirements of that rule to the extent such requirements are not inconsistent with the provisions of this rule or any other provision of law governing the procedure in contested cases.

Motions for summary judgment may be filed and served within a reasonable time prior to the hearing, as determined by the presiding officer. Any party resisting the motion shall file and serve a resistance within 15 days, unless otherwise ordered by the presiding officer, from the date a copy of the motion was served. The time fixed for hearing or nonoral submission shall be not less than 20 days after the filing of the motion, unless a shorter time is ordered by the presiding officer. A summary judgment order rendered on all issues in a contested case is subject to rehearing pursuant to rule 3.28(17A) and appeal pursuant to rule 3.27(17A).

**191—3.16(17A) Prehearing conference.**

**3.16(1)** Any party may request a prehearing conference. A written request for prehearing conference or an order for prehearing conference on the presiding officer's own motion shall be filed not less than 14 days prior to the hearing date. A prehearing conference shall be scheduled not less than three business days prior to the hearing date.

The presiding officer shall give written notice of the prehearing conference to all parties.

**3.16(2)** Prehearing conferences shall be conducted by telephone unless otherwise ordered.

**3.16(3)** Each party shall exchange and receive prior to the prehearing conference:

a. A final list of the witnesses who the party anticipates will testify at hearing. Witnesses not listed may be excluded from testifying unless there was good cause for failure to include their names; and

b. A final list of exhibits which the party anticipates will be introduced at hearing. Exhibits other than rebuttal exhibits that are not listed may be excluded from admission into evidence unless there was good cause for failure to include them.

**3.16(4)** Witness or exhibit lists may be amended subsequent to the prehearing conference within time limits established by the presiding officer at the prehearing conference. Any such amendments must be served on all parties.

**3.16(5)** In addition to the requirements of subrule 3.16(3), the parties at a prehearing conference may:

a. Enter into stipulations of law or fact;

b. Enter into stipulations on the admissibility of exhibits;

c. Identify matters which the parties intend to request be officially noticed;

d. Enter into stipulations for waiver of any provision of law; and

e. Consider any additional matters which will expedite the hearing.

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**191—3.17(17A) Continuances.** Unless otherwise provided, applications for continuances shall be made to the presiding officer.

**3.17(1)** An application for a continuance shall:

a. Be made at the earliest possible time and no less than 14 days before the hearing except in case of unanticipated emergencies, and

b. State the specific reasons for the request.

**3.17(2)** In determining whether to grant a continuance, the presiding officer may consider:

a. Prior continuances;

b. The interests of all parties;

c. The likelihood of informal settlement;

d. The existence of an emergency;

e. Any objection;

f. Any applicable time requirements;

g. The existence of a conflict in the schedules of counsel, parties, or witnesses;

h. The timeliness of the request;

i. Failure to timely provide discovery responses; and

j. Other relevant factors.

The presiding officer may require documentation of any grounds for continuance.

**191—3.18(17A) Withdrawals.** A party requesting a contested case proceeding may withdraw that request prior to the hearing.

**191—3.19(17A) Intervention.**

**3.19(1)** A motion for leave to intervene in a contested case proceeding shall state the grounds for the proposed intervention, including any statutory grounds, and the position and interest of the proposed intervenor. A proposed answer or petition in intervention shall be attached to the motion. Any party may file a response within 14 days of service of the motion to intervene unless the time period is extended or shortened by the presiding officer.

**3.19(2)** Motion for leave to intervene shall be filed as early in the proceeding as possible to avoid adverse impact on existing parties or the conduct of the proceeding. Unless otherwise ordered, a motion for leave to intervene shall be filed before the prehearing conference, if any, or at least 20 days before the date scheduled for hearing. Any later motion must contain a statement of good cause for failure to file in a timely manner. Unless inequitable or unjust, an intervenor shall be bound by any agreement, arrangement, or other matter previously raised in the case. Requests by untimely intervenors for continuances which would delay the proceeding will ordinarily be denied.

**3.19(3)** The movant shall demonstrate that (a) intervention would not unduly prolong the proceedings or otherwise prejudice the rights of existing parties; (b) the movant is likely to be aggrieved or adversely affected by a final order in the proceeding; and (c) the interests of the movant are not adequately represented by existing parties; or (d) there exists a statutory right to intervene.

**3.19(4)** If appropriate, the presiding officer may order consolidation of the petitions and briefs of different parties whose interests are aligned and limit the number of representatives allowed to participate actively in the proceedings. A person granted leave to intervene is a party to the proceeding. The order granting intervention may restrict the issues that may be raised by the intervenor or otherwise condition the intervenor's participation in the proceeding.

**191—3.20(17A) Hearing procedures.**

**3.20(1)** The presiding officer presides at the hearing, and may rule on motions, require briefs, issue a proposed deci-

sion, and issue such orders and rulings as will ensure orderly conduct of the proceedings.

**3.20(2)** The presiding officer shall conduct the hearing in the following manner:

a. The presiding officer shall give an opening statement briefly describing the nature of the proceedings;

b. Parties shall be given an opportunity to present opening statements;

c. Parties shall present their cases in the sequence determined by the presiding officer;

d. Each witness shall be sworn or affirmed by the presiding officer or the court reporter, and be subject to examination and cross-examination. The presiding officer may limit questioning in a manner consistent with law; and

e. When all parties and witnesses have been heard, parties may be given the opportunity to present final arguments.

**3.20(3)** The presiding officer shall maintain the decorum of the hearing and may refuse to admit or may expel a person whose conduct is disorderly.

**3.20(4)** Parties have the right to participate or to be represented in all hearings or prehearing conferences related to their case. Partnerships, corporations, or associations may be represented by any member, officer, director, or duly authorized agent. Any party may be represented by an attorney or another person authorized by law.

**3.20(5)** Subject to terms and conditions prescribed by the presiding officer, parties have the right to introduce evidence on issues of material fact, cross-examine witnesses present at the hearing as necessary for a full and true disclosure of the facts, present evidence in rebuttal, and submit briefs and engage in oral argument.

**3.20(6)** All objections shall be timely made and stated on the record.

**3.20(7)** Witnesses may be sequestered during the hearing.

**191—3.21(17A) Evidence.**

**3.21(1)** The presiding officer shall rule on admissibility of evidence and may, where appropriate, take official notice of facts in accordance with applicable requirements of law.

**3.21(2)** Stipulation of facts is encouraged. The presiding officer may make a decision based on stipulated facts.

**3.21(3)** Evidence in the proceeding shall be confined to the issues as to which the parties received notice prior to the hearing unless the parties waive their right to such notice or the presiding officer determines that good cause justifies expansion of the issues. If the presiding officer decides to admit evidence on issues outside the scope of the notice over the objection of a party who did not have actual notice of those issues, that party, upon timely request, may receive a continuance sufficient to amend pleadings and to prepare on the additional issue.

**3.21(4)** The party seeking admission of an exhibit must provide opposing parties with an opportunity to examine the exhibit prior to the ruling on its admissibility. Copies of documents should normally be provided to opposing parties. All exhibits admitted into evidence shall be appropriately marked and be made part of the record.

**3.21(5)** A party may object to specific evidence. A party may request limits on the scope of any examination or cross-examination. Objections shall be accompanied by a brief statement of the grounds upon which it is based. The objection, the ruling on the objection, and the reasons for the ruling shall be noted in the record. The presiding officer may rule on the objection at the time it is made or may reserve a ruling until the written decision, if appropriate.

**3.21(6)** Whenever evidence is ruled inadmissible, the party offering that evidence may submit an offer of proof on

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the record. The party making the offer of proof for excluded oral testimony shall briefly summarize the testimony or, with permission of the presiding officer, present the testimony. If the excluded evidence consists of a document or exhibit, it shall be marked as part of an offer of proof and inserted in the record.

**191—3.22(17A) Default.**

**3.22(1)** If a party fails to appear or participate in a contested case proceeding after proper service of notice, the presiding officer may, if no adjournment is granted, enter a default decision or proceed with the hearing and render a decision in the absence of the party.

**3.22(2)** Where appropriate and not contrary to law, any party may move for default against a party who has requested the contested case proceeding and failed to file a required pleading or has failed to appear after proper service.

**3.22(3)** Default decisions or decisions rendered on the merits after a party has failed to appear or participate become final agency action unless, within 15 days after the date of notification or mailing of the decision, a motion to vacate is filed and served on all parties or an appeal of a decision on the merits is timely initiated within the time provided by rule 3.27(17A). A motion to vacate must state all facts relied upon by the moving party which establish that good cause existed for that party's failure to appear or participate at the contested case proceeding. Each fact so stated must be substantiated by at least one sworn affidavit of a person with personal knowledge of each such fact, which affidavit(s) must be attached to the motion.

**3.22(4)** The time for further appeal of a decision for which a timely motion to vacate has been filed is stayed pending a decision on the motion to vacate.

**3.22(5)** Properly substantiated and timely filed motions to vacate shall be granted only for good cause shown. The burden of proof as to good cause is on the moving party. Adverse parties shall have ten days to respond to a motion to vacate. Adverse parties shall be allowed to conduct discovery as to the issue of good cause and to present evidence on the issue prior to a decision on the motion, if a request to do so is included in that party's response.

**3.22(6)** "Good cause" for purposes of this rule shall have the same meaning as "good cause" for setting aside a default judgment under Iowa Rule of Civil Procedure 236.

**3.22(7)** A decision denying a motion to vacate is subject to further appeal within the time limit allowed for further appeal of a decision on the merits in the contested case proceeding. A decision granting a motion to vacate is subject to interlocutory appeal by the adverse party pursuant to rule 3.25(17A).

**3.22(8)** If a motion to vacate is granted and no timely interlocutory appeal has been taken, the presiding officer shall schedule another hearing on the merits and the contested case shall proceed accordingly.

**3.22(9)** A default decision may award any relief consistent with the request for relief made in the petition, notice of hearing, or charging document and embraced in its issues.

**3.22(10)** A default decision may provide either that the default decision is to be stayed pending a timely motion to vacate or that the default decision is to take effect immediately, subject to a request for stay under rule 3.29(17A).

**191—3.23(17A) Ex parte communication.**

**3.23(1)** Unless required for the disposition of ex parte matters specifically authorized by statute, following issuance of the notice of hearing, there shall be no communication, directly or indirectly, between the presiding officer and

any party or representative of any party or any other person with a direct or indirect interest in such case in connection with any issue of fact or law in the case except upon notice and opportunity for all parties to participate. This does not prohibit persons jointly assigned such tasks from communicating with each other. Nothing in this provision is intended to preclude the presiding officer from communicating with members of the division or seeking the advice or help of persons other than those with a personal interest in, or those engaged in personally investigating as defined in rule 3.9(2), prosecuting, or advocating in, either the case under consideration or a pending factually related case involving the same parties as long as those persons do not directly or indirectly communicate to the presiding officer any ex parte communications they have received of a type that the presiding officer would be prohibited from receiving or that furnish, augment, diminish, or modify the evidence in the record.

**3.23(2)** Prohibitions on ex parte communications commence with the issuance of the notice of hearing in a contested case and continue for as long as the case is pending.

**3.23(3)** Written, oral or other forms of communication are "ex parte" if made without notice and opportunity for all parties to participate.

**3.23(4)** To avoid prohibited ex parte communications notice must be given in a manner reasonably calculated to give all parties a fair opportunity to participate. Notice of written communications shall be provided in compliance with rule 3.12(17A) and may be supplemented by telephone, facsimile, electronic mail or other means of notification.

**3.23(5)** Persons who jointly act as presiding officer in a pending contested case may communicate with each other without notice or opportunity for parties to participate.

**3.23(6)** Communications with the presiding officer involving uncontested scheduling or procedural matters do not require notice or opportunity for parties to participate. Parties should notify other parties prior to initiating such contact with the presiding officer when feasible, and shall notify other parties when seeking to continue hearings or other deadlines pursuant to rule 3.16(17A).

**3.23(7)** A presiding officer who receives a prohibited ex parte communication during the pendency of a contested case must initially determine if the effect of the communication is so prejudicial that the presiding officer should be disqualified. If the presiding officer determines that disqualification is warranted, a copy of any prohibited written communication, all written responses to the communication, a written summary stating the substance of any prohibited oral or other communication not available in written form for disclosure, all responses made, and the identity of each person from whom the presiding officer received a prohibited ex parte communication shall be submitted for inclusion in the record, either under seal by protective order or in the public file, at the discretion of the presiding officer. If the presiding officer determines that disqualification is not warranted, such documents shall be submitted for inclusion in the record and served on all parties. Any party desiring to rebut the prohibited communication must be allowed the opportunity to do so upon written request filed within ten days after notice of the communication.

**3.23(8)** Promptly after being assigned to serve as presiding officer at any stage in a contested case proceeding, a presiding officer shall disclose to all parties material factual information received through ex parte communication prior to such assignment unless the factual information has already been or shortly will be disclosed pursuant to Iowa Code section 17A.13(2) or through discovery. Factual information

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contained in an investigative report or similar document need not be separately disclosed by the presiding officer as long as such documents have been or will shortly be provided to the parties.

**3.23(9)** The presiding officer may render a proposed or final decision imposing appropriate sanctions for violations of this rule including default, a decision against the offending party, censure, suspension or revocation of the privilege to practice before the agency. Violation of ex parte communication prohibitions by agency personnel shall be reported to the first deputy commissioner or designee for possible sanctions including censure, suspension, dismissal or other disciplinary action.

**191—3.24(17A) Recording costs.** Upon request, the insurance division shall provide a copy of the whole or any portion of the record at a reasonable cost. The cost of preparing a copy of the record or of transcribing the hearing record shall be paid by the requesting party.

Parties who request that a hearing be recorded by certified shorthand reporters rather than by electronic means shall bear the cost of that recordation, unless otherwise provided by law.

**191—3.25(17A) Interlocutory appeals.** Upon written request of a party or on its own motion, the commissioner or designee may review an interlocutory order of the presiding officer. In determining whether to do so, the commissioner or designee shall weigh the extent to which granting the interlocutory appeal would expedite final resolution of the case and the extent to which review of that interlocutory order at the time the proposed decision of the presiding officer is reviewed would provide an adequate remedy. Any request for interlocutory review must be filed within 14 days of issuance of the challenged order, but no later than the time for compliance with the order or the date of hearing, whichever is first.

**191—3.26(17A) Final decision.**

**3.26(1)** When the commissioner presides over the reception of evidence at the hearing, the commissioner's decision is a final decision.

**3.26(2)** When the commissioner does not preside over the reception of evidence, the presiding officer shall make a proposed decision. The proposed decision becomes the final decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the commissioner within the time provided in rule 3.27(17A).

**191—3.27(17A) Appeals and review.**

**3.27(1)** Any adversely affected party may appeal a proposed decision to the commissioner within 30 days after issuance of the proposed decision.

**3.27(2)** The insurance division may initiate review of a proposed decision on its own motion at any time within 30 days following issuance of such a decision.

**3.27(3)** An appeal of a proposed decision is initiated by filing a timely notice of appeal with the insurance division. The notice of appeal must be signed by the appealing party or a representative of that party and contain a certificate of service. The notice shall specify:

- a. The proposed decision or order appealed from;
- b. The parties initiating the appeal;
- c. The specific findings or conclusions to which exception is taken and any other exceptions to the decision or order;
- d. The grounds for relief; and
- e. The relief sought.

**3.27(4)** On appeal from a proposed decision of a presiding officer, the issues shall be limited to those raised before the presiding officer. No new issues will be considered for the first time on appeal.

**3.27(5)** On appeal, a party may request the taking of additional evidence only by establishing that the evidence is material, that good cause existed for failure to present the evidence at the hearing, and that the party has not waived the right to present the evidence. A written request to present additional evidence must be filed with the notice of appeal or, by a nonappealing party, within ten days of service of the notice of appeal. The commissioner may remand a case to the presiding officer for further hearing or may itself preside at the taking of additional evidence.

**3.27(6)** The commissioner shall issue a schedule for consideration of the appeal.

**3.27(7)** Unless otherwise ordered, within 20 days of the notice of appeal or order for review, each appealing party may file exceptions and briefs. Within 20 days thereafter, any party may file a responsive brief. Briefs shall cite any applicable legal authority and specify relevant portions of the record in that proceeding. Any written requests to present oral argument shall be filed with the briefs. The commissioner may resolve the appeal on the briefs or provide an opportunity for oral argument. The commissioner may shorten or extend the briefing period as appropriate.

**191—3.28(17A) Applications for rehearing.**

**3.28(1)** Any party to a contested case proceeding may file an application for rehearing from a final order.

**3.28(2)** The application for rehearing shall state on whose behalf it is filed, the specific grounds for rehearing, and the relief sought. In addition, the application shall state whether the applicant desires reconsideration of all or part of the agency decision on the existing record and whether, on the basis of the grounds enumerated in rule 3.27(5), the applicant requests an opportunity to submit additional evidence.

**3.28(3)** The application shall be filed with the insurance division within 20 days after issuance of the final decision.

**3.28(4)** A copy of the application shall be timely mailed by the applicant to all parties of record not joining therein. If the application does not contain a certificate of service, the division shall serve copies on all parties.

**3.28(5)** Any application for a rehearing shall be deemed denied unless the commissioner grants the application within 20 days after its filing.

**191—3.29(17A) Stays of agency actions.**

**3.29(1) Petition requirements:**

a. Any party to a contested case proceeding may petition the commissioner for a stay of an order issued in that proceeding or for other temporary remedies, pending review by the agency. The petition shall be filed with the notice of appeal and shall state the reasons justifying a stay or other temporary remedy. The commissioner may rule on the stay or authorize the presiding officer to do so.

b. Any party to a contested case proceeding may petition the commissioner for a stay or other temporary remedy pending judicial review of all or part of that proceeding. The petition shall state the reasons justifying a stay or other temporary remedy.

**3.29(2)** In determining whether to grant a stay, the presiding officer or commissioner shall consider the factors listed in 1998 Iowa Acts, chapter 1202, section 23(5c).

**3.29(3)** A stay may be vacated by the issuing authority upon application of the commissioner or any other party.

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**191—3.30(17A) No factual dispute contested cases.** If the parties agree that no dispute of material fact exists as to a matter that would be a contested case if such a dispute of fact existed, the parties may present all relevant admissible evidence either by stipulation or otherwise as agreed by the parties, without necessity for the production of evidence at an evidentiary hearing. If such agreement is reached, a jointly submitted schedule detailing the method and timetable for submission of the record, briefs and oral argument should be submitted to the presiding officer for approval as soon as is practicable.

**191—3.31(17A) Emergency adjudicative proceedings.**

**3.31(1)** To the extent necessary to prevent or avoid immediate danger to the public health, safety, or welfare, and consistent with the Constitution and other provisions of law, the insurance division may issue a written order in compliance with 1998 Iowa Acts, chapter 1202, section 21, to suspend a license in whole or in part, order the cessation of any continuing activity, order affirmative action, or take other action within the jurisdiction of the division by emergency adjudicative order. Before issuing an emergency adjudicative order the division shall consider factors including, but not limited to, the following:

a. Whether there has been a sufficient factual investigation to ensure that the division is proceeding on the basis of reliable information;

b. Whether the specific circumstances which pose immediate danger to the public health, safety or welfare have been identified and determined to be continuing;

c. Whether the person required to comply with the emergency adjudicative order may continue to engage in other activities without posing immediate danger to the public health, safety or welfare;

d. Whether imposition of monitoring requirements or other interim safeguards would be sufficient to protect the public health, safety or welfare;

e. Whether the specific action contemplated by the insurance division is necessary to avoid the immediate danger; and

f. Whether the proposed emergency adjudicative order is sufficiently limited in scope and narrowly tailored to protect the public health, safety or welfare.

**3.31(2)** An emergency adjudicative order shall contain findings of fact, conclusions of law, and policy reasons to justify the determination of an immediate danger in the insurance division's decision to take immediate action.

a. The written emergency adjudicative order shall be immediately delivered to persons who are required to comply with the order by utilizing one or more of the following procedures:

- (1) Personal delivery;
- (2) Certified mail, return receipt requested, to the last address on file with the division;
- (3) Certified mail to the last address on file with the division;
- (4) First-class mail to the last address on file with the division;
- (5) Restricted certified mail;
- (6) Facsimile or other electronic transmission. Facsimile or other electronic transmission may be used as the sole method of delivery if the person required to comply with the order has filed a written request that agency orders be sent by facsimile and has provided a fax number for that purpose.

b. If practical, the insurance division shall select the procedure for providing written notice that best ensures prompt, reliable delivery.

**3.31(3)** Unless the written emergency adjudicative order is provided by personal delivery on the same day that the order issues, the insurance division shall make reasonable immediate efforts to contact by telephone the persons who are required to comply with the order.

**3.31(4)** After issuance of an emergency adjudicative order, the insurance division shall proceed as quickly as feasible to complete any proceedings that would be required if the matter did not involve an immediate danger.

**3.31(5)** A written emergency adjudicative order shall include notification of the date on which insurance division proceedings are scheduled for completion. After an emergency adjudicative order is issued, continuance of further division proceedings to a later date will be granted only in compelling circumstances, and upon written application.

**191—3.32(17A,502,505) Summary orders.** When action is permitted to be taken without a prior hearing, the insurance division's order shall be sent to the last-known address of the party by restricted certified mail, return receipt requested. The order shall state the reasons for the division's action, cite the law or rule involved, and state that the party will be afforded a hearing, if a hearing is requested within 30 days of the date of the signing of the order.

**191—3.33(17A,502,505) Informal settlement.**

**3.33(1)** A party to a controversy that may culminate in contested case proceedings may attempt informal settlement of the controversy by complying with the procedures set forth in this subrule. No party to a controversy shall be required to settle the controversy by submitting to informal settlement procedures.

a. Parties desiring informal settlement shall set forth in writing the various points of a proposed settlement, which may include a stipulated statement of facts.

b. When signed by the parties to a controversy, a proposed settlement shall represent final disposition of the matter in place of contested case proceedings.

c. Where there are more than two parties to a controversy involving the insurance division, a separate settlement between one party and the division is permissible.

d. A proposed settlement which is not accepted or signed by the parties shall not be admitted as evidence in the record of a contested case proceeding.

**3.33(2)** A party to a contested case proceeding may attempt informal settlement by complying with the procedures set forth in this subrule. No party shall be required to settle the contested case proceeding by submitting to informal settlement procedures.

a. Parties desiring informal settlement shall set forth in writing the various points of a proposed settlement, which may include a stipulated statement of facts.

b. When signed by the parties to the contested case proceeding and the presiding officer, a proposed settlement shall represent final disposition of the proceeding.

c. Where there are more than two parties to a contested case proceeding involving the insurance division, a separate settlement between one party and the division is permissible.

d. A proposed settlement which is not accepted or signed by the parties and the presiding officer shall not be admitted as evidence in the record of a contested case proceeding.

**191—3.34(17A,502,505) Witness fees.**

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**3.34(1)** Subpoenaed witnesses shall be entitled to receive fees authorized by Iowa Code section 622.69.

**3.34(2)** Witnesses called to testify only to an opinion founded on special study or experience in any branch of science, or to make scientific or professional examinations and state the result thereof, may receive additional compensation, to be fixed by the presiding officer, with reference to the value of the time employed and the degree of learning or skill required; but such additional compensation shall not exceed the sum set forth in Iowa Code section 622.72.

These rules are intended to implement Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202.

ITEM 3. Rescind 191—Chapter 4 and adopt the following new chapter:

## CHAPTER 4

## AGENCY PROCEDURE FOR RULE MAKING

**191—4.1(17A) Applicability.** Except to the extent otherwise expressly provided by statute, all rules adopted by the insurance division are subject to the provisions of Iowa Code chapter 17A, the Iowa administrative procedure Act, and the provisions of this chapter.

**191—4.2(17A) Advice on possible rules before notice of proposed rule adoption.** In addition to seeking information by other methods, the insurance division may, before publication of a Notice of Intended Action under Iowa Code section 17A.4(1)“a,” solicit comments from the public on a subject matter of possible rule making by causing notice to be published in the *Iowa Administrative Bulletin* and indicating where, when, and how persons may comment.

**191—4.3(17A) Public rule-making docket.**

**4.3(1)** The insurance division shall maintain a current public rule-making docket.

**4.3(2)** The rule-making docket shall list each pending rule-making proceeding. A rule-making proceeding is pending from the time it is commenced by publication in the *Iowa Administrative Bulletin* to the time it is terminated or the rule becomes effective. For each rule-making proceeding, the docket shall indicate:

- a. The subject matter of the proposed rule;
- b. A citation to all published notices relating to the proceeding;
- c. Where written submissions on the proposed rule may be inspected;
- d. The time during which written submissions may be made;
- e. The names of persons who have made written requests for an opportunity to make oral presentations on the proposed rule, where those requests may be inspected and where and when oral presentations may be made;
- f. Whether a written request for issuance of a regulatory analysis or a concise statement of reasons has been filed, whether such an analysis or statement or a fiscal impact statement has been issued, and where any such written request, analysis or statement may be inspected;
- g. The current status of the proposed rule;
- h. Any known timetable for division decisions or other action in the proceeding;
- i. The date of the rule's adoption;
- j. The date of the rule's filing and publication;
- k. The date on which the rule will become effective; and
- l. Where the rule-making record may be inspected.

**191—4.4(17A) Notice of proposed rule making.**

**4.4(1)** At least 35 days before adoption of a rule the insurance division shall publish Notice of Intended Action in the *Iowa Administrative Bulletin*. The Notice of Intended Action shall include:

- a. A brief explanation of the purpose of the proposed rule;
- b. The specific legal authority for the proposed rule;
- c. Except to the extent impracticable, the text of the proposed rule;
- d. Where, when, and how persons may present their views on the proposed rule; and
- e. Where, when, and how persons may request an oral proceeding on the proposed rule if the notice does not already provide for one.

Where inclusion of the complete text of a proposed rule in the Notice of Intended Action is impractical, the insurance division shall include in the notice a statement fully describing the specific subject matter of the omitted portion of the text of the proposed rule, the specific issues to be addressed by that omitted text of the proposed rule, and the range of possible choices being considered by the division for the resolution of each of those issues.

**4.4(2)** A proposed rule may incorporate other materials by reference only if it complies with rule 4.12(2).

**4.4(3)** Persons desiring copies of future Notices of Intended Action by subscription must file with the insurance division at the address disclosed in rule 191—1.2(502,505) a written request indicating the name and address to which such notices should be sent. The request shall specify whether the person wants to receive insurance rules, securities bureau rules as defined by rule 191—1.1(502,505), or both. Within seven days after submission of a Notice of Intended Action for publication, the division shall mail or otherwise transmit a copy of that notice to subscribers who have filed a written request. The written request shall be accompanied by payment of the subscription price. The subscription price per calendar year is \$15 for securities rules only, \$15 for insurance rules only, and \$30 for both.

**191—4.5(17A) Public participation.**

**4.5(1)** For at least 20 days after publication of the Notice of Intended Action, persons may submit argument, data and views, in writing, on the proposed rule. Such written submissions should identify the proposed rule to which they relate and should be submitted to the insurance division or the person designated in the Notice of Intended Action, at the address disclosed in rule 191—1.2(502,505).

**4.5(2)** The insurance division may, at any time, schedule an oral proceeding on a proposed rule. The division shall schedule an oral proceeding on a proposed rule if, within 20 days after the published Notice of Intended Action, a written request for an opportunity to make oral presentations is submitted to the division by the administrative rules review committee, a governmental subdivision, an agency, an association having not less than 25 members, or at least 25 persons. That request must also contain the following:

- a. A request by one or more individual persons must be signed by each person and include the address and telephone number of each person;
- b. A request by an association must be signed by an officer or designee of the association and must contain a statement that the association has at least 25 members and the address and telephone number of the person signing that request; and
- c. A request by an agency or governmental subdivision must be signed by an official having authority to act on be-

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half of the entity and must contain the address and telephone number of the person signing that request.

**4.5(3)** This rule applies only to those oral rule-making proceedings in which an opportunity to make oral presentations is authorized or required by Iowa Code section 17A.4(1)"b" as amended by 1998 Iowa Acts, chapter 1202, section 8, or this chapter.

a. An oral proceeding on a proposed rule may be held in one or more locations and shall not be held earlier than 20 days after notice of its location and time is published in the Iowa Administrative Bulletin. That notice shall also identify the proposed rule by ARC number and citation to the Iowa Administrative Bulletin.

b. The commissioner, or another person designated by the commissioner who will be familiar with the substance of the proposed rule, shall preside at the oral proceeding on a proposed rule.

**4.5(4)** At an oral proceeding on a proposed rule, persons may make oral statements and make documentary and physical submissions, which may include data, views, comments or arguments concerning the proposed rule. Persons wishing to make oral presentations at such a proceeding are encouraged to notify the insurance division at least one business day prior to the proceeding and indicate the general subject of their presentations. At the proceeding, those who participate shall indicate their names and addresses, identify any persons or organizations they may represent, and provide any other information relating to their participation deemed appropriate by the presiding officer. Oral proceedings shall be open to the public and shall be recorded by stenographic or electronic means.

a. At the beginning of the oral proceeding, the presiding officer shall give a brief synopsis of the proposed rule, a statement of the statutory authority for the proposed rule, and the reasons for the agency decision to propose the rule. The presiding officer may place time limitations on individual oral presentations when necessary to ensure the orderly and expeditious conduct of the oral proceeding. To encourage joint oral presentations and to avoid repetition, additional time may be provided for persons whose presentations represent the views of other individuals as well as their own.

b. Persons making oral presentations are encouraged to avoid restating matters which have already been submitted in writing.

c. To facilitate the exchange of information, the presiding officer may, where time permits, open the floor to questions or general discussion.

d. The presiding officer shall have the authority to take any reasonable action necessary for the orderly conduct of the meeting.

e. Physical and documentary submissions presented by participants in the oral proceeding shall be submitted to the presiding officer. Such submissions become the property of the insurance division.

f. The oral proceeding may be continued by the presiding officer to a later time without notice other than by announcement at the hearing.

g. Participants in an oral proceeding shall not be required to take an oath or to submit to cross-examination. However, the presiding officer in an oral proceeding may question participants and permit the questioning of participants by other participants about any matter relating to that rule-making proceeding, including any prior written submissions made by those participants in that proceeding; but no participant shall be required to answer any question.

h. The presiding officer in an oral proceeding may permit rebuttal statements and request the filing of written statements subsequent to the adjournment of the oral presentations.

**4.5(5)** In addition to receiving written comments and oral presentations on a proposed rule according to the provisions of this rule, the insurance division may obtain information concerning a proposed rule through any other lawful means deemed appropriate under the circumstances.

**4.5(6)** The insurance division shall schedule oral proceedings in rooms accessible to and functional for persons with physical disabilities. Persons who have special requirements should contact the division at (515)281-5705 in advance to arrange access or other needed services. Persons who are hearing impaired should call Relay Iowa TTY at 1-800-735-2942.

**191—4.6(17A) Regulatory analysis.**

**4.6(1)** A "small business" is defined in 1998 Iowa Acts, chapter 1202, section 10(7).

**4.6(2)** Small businesses or organizations of small businesses may be registered on the insurance division's small business impact list by making a written application to the division at the address disclosed in rule 191—1.2(502,505). The application for registration shall state:

a. The name of the small business or organization of small businesses;

b. Its address;

c. The name of a person authorized to transact business for the applicant;

d. A description of the applicant's business or organization; an organization representing 25 or more persons who each qualify as a small business shall indicate that fact; and

e. Whether the applicant desires copies of Notices of Intended Action, for a reasonable cost, or desires advance notice of the subject of all or some specific category of proposed rule making affecting small business.

The insurance division may at any time request additional information from the applicant to determine whether the applicant is qualified as a small business or as an organization of 25 or more small businesses. The division may periodically send a letter to each registered small business or organization, or organization of small businesses, asking whether that business or organization wishes to remain on the registration list. The name of a small business or organization of small businesses will be removed from the list if a negative response is received, or if no response is received within 30 days after the letter is sent.

**4.6(3)** Within seven days after submission of a Notice of Intended Action to the administrative rules coordinator for publication in the Iowa Administrative Bulletin, the insurance division shall mail to all registered small businesses or organizations of small businesses, in accordance with their request, either a copy of the Notice of Intended Action or notice of the subject of that proposed rule making. For a rule that may have an impact on small business adopted in reliance upon Iowa Code section 17A.4(2), the division shall mail notice of the adopted rule to registered businesses or organizations prior to the time the adopted rule is published in the Iowa Administrative Bulletin.

**4.6(4)** The insurance division shall issue a regulatory analysis of a proposed rule that conforms to the requirements of 1998 Iowa Acts, chapter 1202, section 10(2a), after a proper request from:

a. The administrative rules review committee; or

b. The administrative rules coordinator.

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**4.6(5)** The insurance division shall issue a regulatory analysis of a proposed rule that conforms to the requirements of 1998 Iowa Acts, chapter 1202, section 10(2b), after a proper request from:

- a. The administrative rules review committee; or
- b. The administrative rules coordinator;
- c. At least 25 or more persons who sign the request provided that each represents a different small business; or
- d. An organization representing at least 25 small businesses. The request shall list the name, address and telephone number of not less than 25 small businesses it represents.

**4.6(6)** Upon receipt of a timely request for a regulatory analysis the insurance division shall adhere to the time lines described in 1998 Iowa Acts, chapter 1202, section 10(4).

**4.6(7)** A request for a regulatory analysis is made when it is received by the division, at the address disclosed in rule 191—1.2(502,505). The request shall be in writing and satisfy the requirements of 1998 Iowa Acts, chapter 1202, section 10(1).

**4.6(8)** The contents of the concise summary shall conform to the requirements of 1998 Iowa Acts, chapter 1202, section 10(4,5).

**4.6(9)** Upon request, the insurance division shall make available to the extent feasible, copies of the published summary in conformance with 1998 Iowa Acts, chapter 1202, section 10(5).

**4.6(10)** When a regulatory analysis is issued in response to a written request from the administrative rules review committee or the administrative rules coordinator, the regulatory analysis shall conform to the requirements of 1998 Iowa Acts, chapter 1202, section 10(2a), unless a written request expressly waives one or more of the items listed in that section.

**4.6(11)** When a regulatory analysis is issued in response to a written request from the administrative rules review committee, the administrative rules coordinator, at least 25 persons signing that request who each qualify as a small business or by an organization representing at least 25 small businesses, and, if the insurance division determines that the rule would have a substantial impact on small businesses, the regulatory analysis shall conform to the requirements of 1998 Iowa Acts, chapter 1202, section 10(2b).

**191—4.7(17A, 25B) Fiscal impact statement.**

**4.7(1)** A proposed rule that mandates additional combined expenditures exceeding \$100,000 by all affected political subdivisions or agencies and entities which contract with political subdivisions to provide services must be accompanied by a fiscal impact statement outlining the costs associated with the rule. A fiscal impact statement must satisfy the requirements of Iowa Code section 25B.6.

**4.7(2)** If the insurance division determines at the time it adopts a rule that the fiscal impact statement upon which the rule is based contains errors, the division shall, at the same time, issue a corrected fiscal impact statement and publish the corrected fiscal impact statement in the Iowa Administrative Bulletin.

**191—4.8(17A) Time and manner of rule adoption.**

**4.8(1)** The insurance division shall not adopt a rule until the period for making written submissions and oral presentations has expired. Within 180 days after the later of the publication of the Notice of Intended Action, or the end of oral proceedings thereon, the insurance division shall adopt a rule pursuant to the rule-making proceeding or terminate the proceeding by publication in the Iowa Administrative Bulletin.

**4.8(2)** Before the adoption of a rule, the insurance division shall fully consider all of the written and oral submissions received in that rule-making proceeding and any regulatory analysis or fiscal impact statement issued in that rule-making proceeding.

**4.8(3)** Except as otherwise provided by law, the insurance division may use its own experience, technical competence, specialized knowledge and judgment in the adoption of a rule.

**191—4.9(17A) Variance between adopted rule and rule proposed in Notice of Intended Action.** The insurance division shall not adopt a rule that differs from the rule proposed in the Notice of Intended Action upon which the rule is based unless:

1. The differences are within the scope of the subject matter announced in the Notice of Intended Action and are in character with the issues raised in that notice; and
2. The differences are a logical outgrowth of the contents of that Notice of Intended Action and the comments submitted in response thereto.

**191—4.10(17A) Exemptions from public rule making procedures.**

**4.10(1)** To the extent the insurance division for good cause finds that public notice and participation are unnecessary, impracticable or contrary to the public interest in the process of adopting a particular rule, the division may adopt that rule without publishing advance Notice of Intended Action in the Iowa Administrative Bulletin and without providing for written or oral public submissions prior to its adoption. The division shall incorporate the required finding and a brief statement of its supporting reasons in each rule adopted in reliance upon this subrule.

**4.10(2)** The insurance division may, at any time, commence a standard rule making proceeding for the adoption of a rule that is identical or similar to a rule it adopts in reliance upon subrule 4.10(1).

**191—4.11(17A) Concise statement of reasons.**

**4.11(1)** When requested by a person, either prior to the adoption of a rule or within 30 days after its publication in the Iowa Administrative Bulletin as an adopted rule, the insurance division shall issue a concise statement of reasons for the rule. Requests for such a statement shall be in writing and shall be delivered to the division at the address disclosed in rule 191—1.2(502,505). The request should indicate whether the statement is sought for all or only a specified part of the rule. Requests will be considered made on the date received.

**4.11(2)** The concise statement of reasons shall contain:

- a. The reasons for adopting the rule;
- b. An indication of any change between the text of the proposed rule contained in the published Notice of Intended Action and the text of the rule as finally adopted, with the reasons for any such change; and
- c. The principal reasons urged in the rule-making proceeding for and against the rule, and the insurance division's reasons for overruling the arguments made against the rule.

**4.11(3)** After a proper request, the insurance division shall issue a concise statement of reasons by the later of the time the rule is adopted or 35 days after receipt of the request.

**191—4.12(17A) Contents, style, and form of rule.**

**4.12(1)** Each rule adopted by the insurance division shall contain the text of the rule and:

- a. The date the division adopted the rule;

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- b. A brief explanation of the principal reasons for the rule-making action;
- c. A reference to all rules repealed, amended, or suspended by the rule;
- d. A reference to the specific statutory or other authority authorizing adoption of the rule;
- e. Any findings required by any provision of law as a prerequisite to adoption or effectiveness of the rule;
- f. A brief explanation of the principal reasons for failure to provide for waivers to the rule if no waiver provision is included and a brief explanation of any waiver or special exceptions provided in the rule if such reasons are required by 1998 Iowa Acts, chapter 1202, section 8, or the insurance division exercises discretion to include such reasons; and
- g. The effective date of the rule.

**4.12(2)** The insurance division may incorporate by reference in a proposed or adopted rule, and without causing publication of the incorporated matter in full, all or any part of a code, standard, rule, or other matter if the division finds that the incorporation of its text in the proposed or adopted rule would be unduly cumbersome, expensive, or otherwise burdensome. The reference in the proposed or adopted rule shall fully and precisely identify the incorporated matter by location, title, citation, date, and edition, if any, and shall briefly indicate the precise subject and the general contents of the incorporated matter. The division may incorporate such matter by reference in a proposed or adopted rule only if the division makes copies of it readily available to the public. The proposed or adopted rule shall state how and where copies of the incorporated matter may be obtained at a reasonable cost from the division. The division shall retain permanently a copy of any materials incorporated by reference in a rule.

If the division adopts standards by reference to another publication, it shall provide a copy of the publication containing the standards to the administrative rules coordinator for deposit in the state law library and may make the standards available electronically.

**4.12(3)** When the administrative code editor omits the full text of a proposed or adopted rule, the insurance division shall prepare and submit to the administrative code editor a summary statement describing the omitted material. This summary statement shall include the title and a brief description sufficient to inform the public of the specific nature and subject matter of the proposed or adopted rules, and of significant issues involved in these rules. The summary statement shall also describe how a copy of the full text of the proposed or adopted rule, including any unpublished matter and any matter incorporated by reference, may be obtained from the division. The division shall provide a copy of that full text for a reasonable charge upon request, shall make copies of the full text available for review at the state law library, and may make the standards available electronically.

**4.12(4)** In preparing its rules, the division shall follow the uniform numbering system, form, and style prescribed by the administrative rules coordinator.

**191—4.13(17A) Agency rule-making record.**

**4.13(1)** The insurance division shall maintain an official rule-making record for each rule proposed or adopted. The rule-making record and materials incorporated by reference must be available for public inspection.

**4.13(2)** The rule-making record shall contain:

- a. Copies of all relevant publications in the Iowa Administrative Bulletin and any file-stamped copies of insurance division submissions to the administrative rules coordinator;

- b. Copies of any relevant portions of the insurance division's public rule-making docket;

c. All written petitions, requests, and submissions received by the insurance division, and all other written materials of a factual nature as distinguished from opinion that are relevant to the merits of the rule and that were created or compiled by the division and considered by the division, in connection with the formulation, proposal, or adoption of the rule or the proceeding upon which the rule is based, except to the extent the division is authorized by law to keep them confidential; provided, however, that when any such materials are deleted because they are authorized by law to be kept confidential, the division shall identify in the record the particular materials deleted and state the reasons for deletion;

d. Any official transcript of oral presentations made in the proceeding upon which the rule is based or, if not transcribed, the stenographic record or electronic recording of those presentations, and any memorandum prepared by a presiding officer summarizing the contents of those presentations;

e. A copy of any regulatory analysis or fiscal impact statement prepared for the proceeding upon which the rule is based;

f. A copy of the rule and any concise statement of reasons prepared for that rule;

g. All petitions for, amendments of, or repeal or suspension of, the rule;

h. A copy of any objection to the issuance of that rule without public notice and participation that was filed pursuant to Iowa Code section 17A.4(2) by the administrative rules review committee, the governor, or the attorney general;

i. A copy of any objection to the rule filed by the administrative rules review committee, the governor, or the attorney general pursuant to Iowa Code section 17A.4(4), and any insurance division response to that objection;

j. A copy of any significant written criticism of the rule, including a summary of any petition for waiver of the rule; and

k. A copy of any executive order concerning the rule.

**4.13(3)** Except as otherwise required by a provision of law, the rule-making record required by this rule need not constitute the exclusive basis for agency action on that rule.

**4.13(4)** The insurance division shall maintain the rule-making record for a period of not less than five years from the later of: (a) the date the rule to which it pertains became effective, (b) the date of the Notice of Intended Action, or (c) the date of any written criticism as described in rule 4.13(2) "g," "h," "i," or "j."

**191—4.14(17A) Filing of rules.** The insurance division shall file each rule it adopts with the administrative rules coordinator. The filing must be executed as soon after adopting the rule as is practicable. At the time of filing, each rule must have attached to it any fiscal impact statement and any concise statement of reasons that was issued for that rule. If a fiscal impact statement or statement of reasons for that rule was not issued until after the filing of that rule, the note or statement must be attached to the filed rule within five working days after the note or statement is issued. In filing a rule, the division shall use the standard form prescribed by the administrative rules coordinator.

**191—4.15(17A) Effectiveness of rules prior to publication.**

**4.15(1)** The insurance division may make a rule effective after its filing at any stated time prior to 35 days after its in-

## INSURANCE DIVISION[191](cont'd)

dexing and publication in the Iowa Administrative Bulletin if the division finds that a statute so provides, the rule confers a benefit or removes a restriction on some segment of the public, or that the effective date of the rule is necessary to avoid imminent peril to the public health, safety, or welfare. The division shall incorporate the required finding and a brief statement of its supporting reasons in each rule adopted in reliance upon this subrule.

**4.15(2)** When the insurance division makes a rule effective prior to its indexing and publication in reliance upon the provisions of Iowa Code section 17A.5(2)"b"(3), the division shall employ all reasonable efforts to make its contents known to the persons who may be affected by that rule prior to the rule's indexing and publication. The term, "all reasonable efforts" requires the division to employ the most effective and prompt means of notice rationally calculated to inform potentially affected parties of the effectiveness of the rule that is justified and practical under the circumstances considering the various alternatives available for this purpose, the comparative costs to the division of utilizing each of those alternatives, and the harm suffered by affected persons from any lack of notice. The means that may be used for providing notice of such rules prior to their indexing and publication include, but are not limited to, any of the following means: radio, newspaper, television, signs, mail, telephone, personal notice or electronic means.

A rule made effective prior to its indexing and publication in reliance upon the provisions of Iowa Code section 17A.5(2)"b"(3) shall include in that rule a statement describing the reasonable efforts that will be used to comply with the requirements of this subrule.

**191—4.16(17A) General statements of policy.**

**4.16(1)** The insurance division shall maintain an official, current, and dated compilation that is indexed by subject, containing all of its general statements of policy within the scope of Iowa Code section 17A.2(10)"a,""c,""f,""g,""h," and "k." Each addition to, change in, or deletion from the official compilation must also be dated, indexed, and a record thereof kept. Except for those portions containing rules governed by Iowa Code section 17A.2(10)"f," or otherwise authorized by law to be kept confidential, the compilation must be made available for public inspection and copying.

**4.16(2)** A general statement of policy subject to the requirements of this subsection shall not be relied on by the insurance division to the detriment of any person who does not have actual, timely knowledge of the contents of the statement until the requirements of subrule 4.16(1) are satisfied. This provision is inapplicable to the extent necessary to avoid imminent peril to the public health, safety or welfare.

**191—4.17(17A) Review of rules by division.**

**4.17(1)** Any interested person, association, agency, or political subdivision may submit a written request to the administrative rules coordinator requesting the insurance division to conduct a formal review of an existing rule. Upon approval of that request by the administrative rules coordinator, the division shall conduct a formal review of a specified rule to determine whether a new rule should be adopted or whether the rule should be amended or repealed. The division may refuse to conduct a review if it has conducted such a review of the specified rule within five years prior to the filing of the written request.

**4.17(2)** In conducting the formal review, the insurance division shall prepare within a reasonable time a written report summarizing its findings, its supporting reasons, and any proposed course of action. The report shall comply with

Iowa Code section 17A.7(2). A copy of the division's report shall be sent to the administrative rules review committee and the administrative rules coordinator. The report shall also be available for public inspection at the division at the address disclosed in rule 191—1.2(502,505).

**191—4.18(17A) Petition for rule making.**

**4.18(1)** Any person or agency may file a petition for rule making with the insurance division at the address disclosed in rule 191—1.2(502,505). A petition is deemed filed when it is received. The division must provide petitioner with a file-stamped copy of the petition if petitioner provides the division an extra copy for this purpose. The petition must be typewritten or legibly handwritten in ink and must substantially conform to the following form:

## BEFORE THE INSURANCE DIVISION OF THE STATE OF IOWA

Petition by (Name of Petitioner) for the (adoption, amendment, or repeal) of rules relating to (state subject matter).	}	PETITION FOR RULE MAKING
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**4.18(2)** The petition shall provide the following information:

a. A statement of the specific rule-making action sought by petitioner including the text or a summary of the contents of the proposed rule or amendment to a rule and, if it is a petition to amend or repeal a rule, a citation to the particular portion or portions of the rule proposed to be amended or repealed.

b. A citation to any law deemed relevant to the insurance division's authority to take the action urged or to the desirability of that action.

c. A brief summary of petitioner's arguments in support of the action urged in the petition.

d. A brief summary of any data supporting the action urged in the petition.

e. The names and addresses of other persons, or a description of any class of persons known by petitioner to be affected by, or interested in, the proposed action which is the subject of the petition.

f. Any request by petitioner for a meeting provided for by subrule 4.18(5).

**4.18(3)** The petition must be dated and signed by petitioner or petitioner's representative. It must also include the name, mailing address, and telephone number of petitioner and petitioner's representative, and a statement indicating the person to whom communications concerning the petition should be directed.

**4.18(4)** The insurance division may deny a petition because it does not substantially conform to the required form.

**4.18(5)** Petitioner may submit a brief in support of the action urged in the petition. The insurance division may request a brief from petitioner or from any other person concerning the substance of the petition.

**4.18(6)** Inquiries concerning the status of a rule-making petition may be made to the insurance division at the address disclosed in rule 191—1.2(502,505).

**4.18(7)** Within 14 days after the filing of a petition, the insurance division must submit a copy of the petition and any accompanying brief to the administrative rules coordinator and to the administrative rules review committee. Upon request by petitioner in the petition, the division must schedule a brief and informal meeting between the petitioner and the division or a member of the division staff, to discuss the peti-

## INSURANCE DIVISION[191](cont'd)

tion. The division may request petitioner to submit additional information or argument concerning the petition.

**4.18(8)** Within 60 days after filing the petition, or within any longer period agreed to by petitioner, the insurance division must, in writing, deny the petition, and notify petitioner of its action and the specific grounds for the denial, or grant the petition and notify petitioner that it has instituted rule-making proceedings on the subject of the petition. Petitioner shall be deemed notified of the denial or grant of the petition on the date when the agency mails or delivers the required notification to petitioner.

**4.18(9)** Denial of a petition because it does not substantially conform to the required form does not preclude the filing of a new petition on the same subject that seeks to eliminate the grounds for the insurance division's rejection of the petition.

These rules are intended to implement Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202.

## ARC 8847A

## LABOR SERVICES DIVISION[875]

## Notice of Intended Action

Twenty-five interested persons, a governmental subdivision, an agency or association of 25 or more persons may demand an oral presentation hereon as provided in Iowa Code section 17A.4(1)"b."

Notice is also given to the public that the Administrative Rules Review Committee may, on its own motion or on written request by any individual or group, review this proposed action under section 17A.8(6) at a regular or special meeting where the public or interested persons may be heard.

Pursuant to the authority of Iowa Code section 17A.3(1), the Labor Commissioner hereby gives Notice of Intended Action to amend Chapter 1, "Description of Organization and Procedures before the Division," Chapter 150, "Construction Contractor Registration," and Chapter 201, "Inspections and Certificates"; and rescind Chapter 300, "Administrative Hearings," Iowa Administrative Code.

The amendments to Chapter 1 are intended to implement 1998 Iowa Acts, chapter 1202, relating to rule-making procedures, declaratory orders and contested cases. Additionally, the Labor Commissioner adopts a new division establishing interest due the division of labor. The amendments to Chapters 150 and 201 reflect the rescission of Chapter 300.

If requested by April 15, 1999, a public hearing will be held on April 19, 1999, at 1 p.m. in the office of the Division of Labor Services, 1000 East Grand Avenue, Des Moines, Iowa. Any interested person will be given the opportunity to make oral or written submissions concerning the proposed amendments. Written data or arguments to be considered in adoption may be submitted by interested persons no later than April 21, 1999, to the Deputy Labor Commissioner, Division of Labor Services, 1000 East Grand Avenue, Des Moines, Iowa 50319-0209.

The Division has determined that this Notice of Intended Action may have an impact on small business. This amendment will not necessitate additional annual expenditures exceeding \$100,000 by political subdivisions or agencies or any contractor providing services to political subdivisions or agencies.

The Division will issue a regulatory flexibility analysis as provided by the Iowa Code if a written request is filed by delivery or by mailing postmarked no later than April 19, 1999, to the Deputy Labor Commissioner, Division of Labor Services, 1000 East Grand Avenue, Des Moines, Iowa 50319. The request may be made by the Administrative Rules Re-

view Committee, the Governor, a political subdivision, at least 25 persons who qualify as a small business under the Act, or an organization of small businesses representing at least 25 persons which is registered with the Division of Labor Services under the Act.

These amendments are intended to implement Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202, and Iowa Code chapters 89 and 91C.

The following amendments are proposed.

ITEM 1. Rescind **875—Chapter 1, Division II**, "Petitions for Rule Making," and reserve rules 875—1.4 to 1.10.

ITEM 2. Redesignate **875—Chapter 1, Division III**, "Open Records and Fair Information Practices," as **Division II**, and reserve rules 875—1.24 to 1.30.

ITEM 3. Rescind 875—Chapter 1, Division IV, and adopt a **new 875—Chapter 1, Division III and Division IV**, as follows:

## DIVISION III

## RULE-MAKING PROCEDURES

**875—1.31(17A) Applicability.** Except to the extent otherwise expressly provided by statute, all rules adopted by the division are subject to the provisions of Iowa Code chapter 17A, the Iowa administrative procedure Act, and the provisions of this chapter.

**875—1.32(17A) Advice on possible rules before notice of proposed rule adoption.** In addition to seeking information by other methods, the division may, before publication of a Notice of Intended Action under Iowa Code section 17A.4(1)"a," solicit comments from the public on a subject matter of possible rule making by the division by causing notice to be published in the Iowa Administrative Bulletin of the subject matter and indicating where, when, and how persons may comment.

**875—1.33(17A) Public rule-making docket.**

**1.33(1) Docket maintained.** The division will maintain a current public rule-making docket.

**1.33(2) Anticipated rule making.** The rule-making docket shall list each anticipated rule-making proceeding. A rule-making proceeding is deemed "anticipated" from the time a draft of proposed rules is distributed for internal discussion within the division. For each anticipated rule-making proceeding, the docket shall contain a listing of the precise subject matter which may be submitted for consideration by the commissioner for subsequent proposal under the provisions of Iowa Code section 17A.4(1)"a," the name and address of division personnel with whom persons may communicate with respect to the matter, and an indication of the present status within the division of that possible rule. The division may also include in the docket other subjects upon which public comment is desired. Drafts of proposed federal regulations are provided to the division for review and comment. These drafts are provided on condition that the draft remain confidential. The division does not consider these drafts to be state documents triggering a rule's being "anticipated." Employees of the division serve on various national consensus organizations developing recommended new guidelines. The division does not consider these as "anticipated" rules.

**1.33(3) Pending rule-making proceedings.** The rule-making docket shall list each pending rule-making proceeding. A rule-making proceeding is pending from the time it is

## LABOR SERVICES DIVISION[875](cont'd)

commenced, by publication in the Iowa Administrative Bulletin of a Notice of Intended Action pursuant to Iowa Code section 17A.4(1)"a," to the time it is terminated, by publication of a Notice of Termination in the Iowa Administrative Bulletin or by the rule's becoming effective. For each rule-making proceeding, the docket shall indicate:

- a. The subject matter of the proposed rule;
- b. A citation to all published notices relating to the proceeding;
- c. Where written submissions on the proposed rule may be inspected;
- d. The time during which written submissions may be made;
- e. The names of persons who have made written requests for an opportunity to make oral presentations on the proposed rule, where those requests may be inspected, and where and when oral presentations may be made;
- f. Whether a written request for the issuance of a regulatory analysis, or a concise statement of reasons, has been filed, whether such an analysis or statement or a fiscal impact statement has been issued, and where any such written request, analysis, or statement may be inspected;
- g. The current status of the proposed rule and any division determinations with respect thereto;
- h. Any known timetable for the division's decisions or other action in the proceeding;
- i. The date of the rule's adoption;
- j. The date of the rule's filing, indexing, and publication;
- k. The date on which the rule will become effective; and
- l. Where the rule-making record may be inspected.

**875—1.34(17A) Notice of proposed rule making.**

**1.34(1) Contents.** At least 35 days before the adoption of a rule, the division will cause a Notice of Intended Action to be published in the Iowa Administrative Bulletin. The Notice of Intended Action shall include:

- a. A brief explanation of the purpose of the proposed rule;
- b. The specific legal authority for the proposed rule;
- c. Except to the extent impracticable, the text of the proposed rule;
- d. Where, when, and how persons may present their views on the proposed rule; and
- e. Where, when, and how persons may demand an oral proceeding on the proposed rule if the notice does not already provide for one.

Where inclusion of the complete text of a proposed rule in the Notice of Intended Action is impracticable, the division will include in the notice a statement fully describing the specific subject matter of the omitted portion of the text of the proposed rule, the specific issues to be addressed by that omitted text of the proposed rule, and the range of possible choices being considered by the division for the resolution of each of those issues.

**1.34(2) Incorporation by reference.** A proposed rule may incorporate other materials by reference only if it complies with all of the requirements applicable to the incorporation by reference of other materials in an adopted rule that are contained in subrule 1.42(2) of this chapter.

**1.34(3) Copies of notices.** Persons desiring to receive copies of future Notices of Intended Action by subscription shall file a written request indicating the name and address to which the notices are to be sent. The request shall be filed with the division's rules coordinator. Additionally, the request shall state the chapter(s) or subjects for which the requester seeks copies. Within seven days after submission of

a Notice of Intended Action to the administrative rules coordinator for publication in the Iowa Administrative Bulletin, the division will mail or electronically transmit a copy of that notice to subscribers who have filed a written request for either mailing or electronic transmittal with the division for Notices of Intended Action. The written request shall be accompanied by payment of the subscription price. The cost of electronic transmission is \$50 per fiscal year. The cost of providing copies of the notices is \$0.50 per page payable within 30 days of mailing the notice. The cost of providing Notices of Intended Action by facsimile is \$1 per page. Failure to pay the cost for a copy will result in the cancellation of the subscription.

**875—1.35(17A) Public participation.**

**1.35(1) Written comments.** For at least 20 days after publication of the Notice of Intended Action, persons may submit argument, data, and views, in writing, on the proposed rule. Such written submissions shall identify the proposed rule to which they relate and shall be submitted to the person and address designated in the Notice of Intended Action.

**1.35(2) Oral proceedings.** The division will schedule an oral proceeding on a proposed rule. The division's scheduled oral proceeding on a proposed rule will be held if, within 20 days after the published Notice of Intended Action, a written request for an opportunity to make oral presentations is submitted to the division's rules coordinator by the administrative rules review committee, a governmental subdivision, an agency, an association having not less than 25 members, or at least 25 persons. That request must also contain the following additional information:

a. A request by one or more individual persons must be signed by each of them and include the address and telephone number of each of them.

b. A request by an association must be signed by an officer or designee of the association and must contain a statement that the association has at least 25 members and the address and telephone number of the person signing that request.

c. A request by an agency or governmental subdivision must be signed by an official having authority to act on behalf of the entity and must contain the address and telephone number of the person signing that request.

**1.35(3) Conduct of oral proceedings.**

a. **Applicability.** This subrule applies only to those oral rule-making proceedings in which an opportunity to make oral presentations is authorized or required by Iowa Code section 17A.4(1)"b" as amended by 1998 Iowa Acts, chapter 1202, section 8, or this chapter.

b. **Scheduling and notice.** An oral proceeding on a proposed rule may be held in one or more locations and will not be held earlier than 20 days after notice of its location and time is published in the Iowa Administrative Bulletin. That notice shall also identify the proposed rule by ARC number and citation to the Iowa Administrative Bulletin.

c. **Presiding officer.** A member of the division will preside at the oral proceeding on a proposed rule.

d. **Conduct of proceeding.** At an oral proceeding on a proposed rule, persons may make oral statements and make documentary and physical submissions, which may include data, views, comments or arguments concerning the proposed rule. Persons wishing to make oral presentations at such a proceeding are encouraged to notify the division at least three business days prior to the proceeding and indicate the general subject of their presentations. At the proceeding, those who participate shall indicate their names and addresses, identify any persons or organizations they may represent,

## LABOR SERVICES DIVISION[875](cont'd)

and provide any other information relating to their participation deemed appropriate by the presiding officer. Oral proceedings shall be open to the public and will be recorded by stenographic or electronic means.

(1) At the beginning of the oral proceeding, the presiding officer will give a brief synopsis of the proposed rule, a statement of the statutory authority for the proposed rule, and the reasons for the division's decision to propose the rule. The presiding officer may place time limitations on individual oral presentations when necessary to ensure the orderly and expeditious conduct of the oral proceeding. To encourage joint oral presentations and to avoid repetition, additional time may be provided for persons whose presentations represent the views of other individuals as well as their own views.

(2) Persons making oral presentations are encouraged to avoid restating matters which have already been submitted in writing.

(3) To facilitate the exchange of information the presiding officer may, where time permits, open the floor to questions or general discussion.

(4) The presiding officer will have the authority to take any reasonable action necessary for the orderly conduct of the meeting.

(5) Physical and documentary submissions presented by participants in the oral proceeding shall be submitted to the presiding officer. The submissions become the property of the division.

(6) The oral proceeding may be continued by the presiding officer to a later time without notice other than by announcement at the hearing.

(7) Participants in an oral proceeding will not be required to take an oath or to submit to cross-examination. However, the presiding officer in an oral proceeding may question participants and permit the questioning of participants by other participants about any matter relating to that rule-making proceeding, including any prior written submissions made by those participants in that proceeding; but no participant shall be required to answer any question.

(8) The presiding officer in an oral proceeding may permit rebuttal statements and request the filing of written statements subsequent to the adjournment of the oral presentations.

**1.35(4) Additional information.** In addition to receiving written comments and oral presentations on a proposed rule according to the provisions of this rule, the division may obtain information concerning a proposed rule through any other lawful means deemed appropriate under the circumstances.

**1.35(5) Accessibility.** The division will schedule oral proceedings in rooms accessible to and functional for persons with physical disabilities. Persons who have special requirements should contact the division's rules coordinator at (515)281-3445 in advance to arrange access or other needed services.

### 875—1.36(17A) Regulatory analysis.

**1.36(1) Definition of small business.** A "small business" is defined in 1998 Iowa Acts, chapter 1202, section 10(7).

**1.36(2) Mailing list.** Small businesses or organizations of small businesses may be registered on the division's small business impact list by making a written application addressed to the division's rules coordinator. The application for registration shall state:

- a. The name of the small business or organization of small businesses;
- b. Its address;

- c. The name of a person authorized to transact business for the applicant;

- d. A description of the applicant's business or organization. An organization representing 25 or more persons who qualify as a small business shall indicate that fact.

- e. Whether the registrant desires copies of Notices of Intended Action at cost, or desires advance notice of the subject of all or some specific category of proposed rule making affecting small business.

The division may at any time request additional information from the applicant to determine whether the applicant is qualified as a small business or as an organization of 25 or more small businesses. The division may periodically send a letter to each registered small business or organization, business or organization of small businesses asking whether that business or organization wishes to remain on the registration list. The name of a small business or organization of small businesses will be removed from the list if a negative response is received, or if no response is received within 30 days after the letter is sent.

**1.36(3) Time of mailing.** Within seven days after submission of a Notice of Intended Action to the administrative rules coordinator for publication in the Iowa Administrative Bulletin, the division will mail to all registered small businesses or organizations of small businesses, in accordance with the request, either a copy of the Notice of Intended Action or notice of the subject of that proposed rule making. In the case of a rule that may have an impact on small business adopted in reliance upon Iowa Code section 17A.4(2), the division will mail notice of the adopted rule to registered businesses or organizations prior to the time the adopted rule is published in the Iowa Administrative Bulletin.

**1.36(4) Qualified requesters for regulatory analysis—economic impact.** The division will issue a regulatory analysis of a proposed rule that conforms to the requirements of 1998 Iowa Acts, chapter 1202, section 10(2a), after a proper request from:

- a. The administrative rules coordinator;
- b. The administrative rules review committee.

**1.36(5) Qualified requesters for regulatory analysis—business impact.** The division will issue a regulatory analysis of a proposed rule that conforms to the requirements of 1998 Iowa Acts, chapter 1202, section 10(2b), after a proper request from:

- a. The administrative rules review committee;
- b. The administrative rules coordinator;
- c. At least 25 or more persons who sign the request provided that each represents a different small business;
- d. An organization representing at least 25 small businesses. That organization shall list the name, address and telephone number of not less than 25 small businesses it represents.

**1.36(6) Time period for analysis.** Upon receipt of a timely request for a regulatory analysis the division will adhere to the time lines described in 1998 Iowa Acts, chapter 1202, section 10(4).

**1.36(7) Contents of request.** A request for a regulatory analysis is made when it is mailed or delivered to the division. The request shall be in writing and satisfy the requirements of 1998 Iowa Acts, chapter 1202, section 10(1).

**1.36(8) Contents of concise summary.** The contents of the concise summary shall conform to the requirements of 1998 Iowa Acts, chapter 1202, section 10(4,5).

**1.36(9) Publication of a concise summary.** The division will make available, to the maximum extent feasible, copies

## LABOR SERVICES DIVISION[875](cont'd)

of the published summary in conformance with 1998 Iowa Acts, chapter 1202, section 10(5).

**1.36(10) Regulatory analysis contents—rules review committee or rules coordinator.** When a regulatory analysis is issued in response to a written request from the administrative rules review committee, or the administrative rules coordinator, the regulatory analysis will conform to the requirements of 1998 Iowa Acts, chapter 1202, section 10(2a), unless a written request expressly waives one or more of the items listed in the section.

**1.36(11) Regulatory analysis contents—substantial impact on small business.** When a regulatory analysis is issued in response to a written request from the administrative rules review committee, the administrative rules coordinator, at least 25 persons signing that request who each qualify as a small business or by an organization representing at least 25 small businesses, the regulatory analysis shall conform to the requirements of 1998 Iowa Acts, chapter 1202, section 10(2b).

**875—1.37(17A,25B) Fiscal impact statement.**

**1.37(1)** A proposed rule that mandates additional combined expenditures exceeding \$100,000 by all affected political subdivisions or agencies and entities which contract with political subdivisions to provide services will be accompanied by a fiscal impact statement outlining the costs associated with the rule. The fiscal impact statement will satisfy the requirements of Iowa Code section 25B.6.

**1.37(2)** If the division determines at the time it adopts a rule that the fiscal impact statement upon which the rule is based contains errors, the division will, at the same time, issue a corrected fiscal impact statement and publish the corrected fiscal impact statement in the Iowa Administrative Bulletin.

**875—1.38(17A) Time and manner of rule adoption.**

**1.38(1) Time of adoption.** The division will not adopt a rule until the period for making written submissions and oral presentations has expired. Within 180 days after the later of the publication of the Notice of Intended Action, or the end of oral proceedings thereon, the division will adopt a rule pursuant to the rule-making proceeding or terminate the proceeding by publication of a notice to that effect in the Iowa Administrative Bulletin.

**1.38(2) Consideration of public comment.** Before the adoption of a rule, the division will consider fully all of the written submissions and oral submissions received in that rule-making proceeding or any memorandum summarizing such oral submissions, and any regulatory analysis or fiscal impact statement issued in that rule-making proceeding.

**1.38(3) Reliance on agency expertise.** Except as otherwise provided by law, the division may use its own experience, technical competence, specialized knowledge, and judgment in the adoption of a rule.

**875—1.39(17A) Variance between adopted rule and published notice of proposed rule adoption.**

**1.39(1)** The division will not adopt a rule that differs from the rule proposed in the Notice of Intended Action on which the rule is based unless:

a. The differences are within the scope of the subject matter announced in the Notice of Intended Action and are in character with the issues raised in that notice;

b. The differences are a logical outgrowth of the contents of that Notice of Intended Action and the comments submitted in response thereto; and

c. The Notice of Intended Action provided fair warning that the outcome of that rule-making proceeding could be the rule in question.

**1.39(2)** In determining whether the Notice of Intended Action provided fair warning that the outcome of that rule-making proceeding could be the rule in question, the division shall consider the following factors:

a. The extent to which persons who will be affected by the rule should have understood that the rule-making proceeding on which it is based could affect their interests;

b. The extent to which the subject matter of the rule or the issues determined by the rule are different from the subject matter or issues contained in the Notice of Intended Action; and

c. The extent to which the effects of the rule differ from the effects of the proposed rule contained in the Notice of Intended Action.

**1.39(3)** The division will commence a rule-making proceeding within 60 days of its receipt of a petition for rule making seeking the amendment or repeal of a rule that differs from the proposed rule contained in the Notice of Intended Action upon which the rule is based, unless the division finds that the differences between the adopted rule and the proposed rule are so insubstantial as to make such a rule-making proceeding wholly unnecessary. A copy of any such finding and the petition to which it responds shall be sent to petitioner, the administrative rules coordinator, and the administrative rules review committee, within three days of its issuance.

**1.39(4) Concurrent rule-making proceedings.** Nothing in this rule disturbs the discretion of the division to initiate, concurrently, several different rule-making proceedings on the same subject with several different published Notices of Intended Action.

**875—1.40(17A) Exemptions from public rule-making procedures.**

**1.40(1) Omission of notice and comment.** To the extent the division for good cause finds that public notice and participation are unnecessary, impracticable, or contrary to the public interest in the process of adopting a particular rule, the division may adopt that rule without publishing advance Notice of Intended Action in the Iowa Administrative Bulletin and without providing for written or oral public submissions prior to its adoption. The division will incorporate the required finding and a brief statement of its supporting reasons in each rule adopted in reliance upon this subrule.

**1.40(2) Categories exempt.** The following narrowly tailored categories of rules are exempted from the usual public notice and participation requirements because those requirements are unnecessary, impracticable, or contrary to the public interest with respect to each and every member of the defined class:

a. Rules implementing legislation which will become effective before the normal procedures could be followed.

b. National consensus standards and federal occupational safety and health regulations are adopted by reference. These documents are published and available to the public in advance of publication of a Notice of Intended Action by the division. The commissioner is required to adopt federal occupational safety and health regulations pursuant to Iowa Code subsection 88.5(1). At times, these rules, when adopted, are effective upon publication in the Iowa Administrative Bulletin.

**1.40(3) Public proceedings on rules adopted without public proceedings.** The division may, at any time, commence a standard rule-making proceeding for the adoption of a rule

## LABOR SERVICES DIVISION[875](cont'd)

that is identical or similar to a rule it adopts in reliance upon subrule 1.40(1). Upon written petition by a governmental subdivision, the administrative rules review committee, an agency, the administrative rules coordinator, an association having not less than 25 members, or at least 25 persons, the division will commence a standard rule-making proceeding for any rule specified in the petition that was adopted in reliance upon subrule 1.40(1). Such a petition must be filed within one year of the publication of the specified rule in the Iowa Administrative Bulletin as an adopted rule. The rule-making proceeding on that rule must be commenced within 60 days of the receipt of such a petition. After a standard rule-making proceeding commenced pursuant to this subrule, the division may either readopt the rule it adopted without benefit of all usual procedures on the basis of subrule 1.40(1), or may take any other lawful action, including the amendment or repeal of the rule in question, with whatever further proceedings are appropriate.

**875—1.41(17A) Concise statement of reasons.**

**1.41(1) General.** When requested by a person, either prior to the adoption of a rule or within 30 days after its publication in the Iowa Administrative Bulletin as an adopted rule, the division will issue a concise statement of reasons for the rule. Requests for such a statement must be in writing and be delivered to the Division of Labor Services, Division Rules Coordinator, 1000 East Grand, Des Moines, Iowa 50319. The request should indicate whether the statement is sought for all or only a specified part of the rule. Requests will be considered made on the date received.

**1.41(2) Contents.** The concise statement of reasons will contain:

- a. The reasons for adopting the rule;
- b. An indication of any change between the text of the proposed rule contained in the published Notice of Intended Action and the text of the rule as finally adopted, with the reasons for any such change;
- c. The principal reasons urged in the rule-making proceeding for and against the rule, and the division's reasons for overruling the arguments made against the rule.

**1.41(3) Time of issuance.** After a proper request, the division will issue a concise statement of reasons by the later of the time the rule is adopted or 35 days after receipt of the request.

**875—1.42(17A,89) Contents, style, and form of rule.**

**1.42(1) Contents.** Each rule adopted by the division will contain the text of the rule and, in addition:

- a. The date the division adopted the rule;
- b. A brief explanation of the principal reasons for the rule-making action if such reasons are required by 1998 Iowa Acts, chapter 1202, section 8, or the division in its discretion decides to include the reasons;
- c. A reference to all rules repealed, amended, or suspended by the rule;
- d. A reference to the specific statutory or other authority authorizing adoption of the rule;
- e. Any findings required by any provision of law as a prerequisite to adoption or effectiveness of the rule;
- f. A brief explanation of the principal reasons for the failure to provide for waivers to the rule if no waiver provision is included and a brief explanation of any waiver or special exceptions provided in the rule if such reasons are required by 1998 Iowa Acts, chapter 1202, section 8, or the division in its discretion decides to include such reasons; and
- g. The effective date of the rule.

**1.42(2) Incorporation by reference.** The division may incorporate, by reference in a proposed or adopted rule, and without causing publication of the incorporated matter in full, all or any part of a code, standard, rule, or other matter if the division finds that the incorporation of its text in the division proposed or adopted rule would be unduly cumbersome, expensive, or otherwise inexpedient. The reference in the division's proposed or adopted rule shall fully and precisely identify the incorporated matter by location, title, citation, date, and edition, if any; shall briefly indicate the precise subject and the general contents of the incorporated matter; and shall state that the proposed or adopted rule does not include any later amendments or editions of the incorporated matter. The division may incorporate such matter by reference in a proposed or adopted rule only when the division makes copies of it readily available to the public. The rule shall state how and where copies of the incorporated matter may be obtained at cost from the division, and how and where copies may be obtained from an agency of the United States, this state, another state, or the organization, association, or persons, originally issuing that matter. The division will retain a copy of any materials incorporated by reference in a rule of the division for two years after the rule ceases to be in effect.

When the division adopts a publication by reference, it will provide a copy of the publication to the administrative rules coordinator for deposit in the state law library and may make the standards available electronically, except:

- a. Copies of materials are not required to be submitted if the division follows Iowa Code section 89.5(4).
- b. Copies of the Code of Federal Regulations and the Federal Register which the state law library possesses.

**1.42(3) References to materials not published in full.** When the administrative code editor decides to omit the full text of a proposed or adopted rule because publication of the full text would be unduly cumbersome, expensive, or otherwise inexpedient, the division will prepare and submit to the administrative code editor for inclusion in the Iowa Administrative Bulletin and Iowa Administrative Code a summary statement describing the specific subject matter of the omitted material. This summary statement shall include the title and a brief description sufficient to inform the public of the specific nature and subject matter of the proposed or adopted rules, and of significant issues involved in these rules. The summary statement shall also describe how a copy of the full text of the proposed or adopted rule, including any unpublished matter and any matter incorporated by reference, may be obtained. The division will provide a copy of that full text at actual cost or review in the offices of the division. Upon request, the division will copy or obtain a copy of the document if requested, provided that the division will not photocopy materials protected by copyright. The division may make the standards available electronically.

At the request of the administrative code editor, the division will provide a proposed statement explaining why publication of the full text would be unduly cumbersome, expensive, or otherwise inexpedient.

**1.42(4) Style and form.** In preparing its rules, the division will follow the uniform numbering system, form, and style prescribed by the administrative rules coordinator.

**875—1.43(17A) Agency rule-making record.**

**1.43(1) Requirement.** The division will maintain an official rule-making record for each rule it proposes by publication in the Iowa Administrative Bulletin of a Notice of Intended Action, or adopts. The rule-making record and mate-

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rials incorporated by reference will be available for public inspection.

**1.43(2) Contents.** The division's rule-making record will contain:

a. Copies of all publications in the Iowa Administrative Bulletin with respect to the rule or the proceeding upon which the rule is based and any file-stamped copies of the division's submissions to the administrative rules coordinator concerning that rule or the proceeding upon which it is based;

b. Copies of any portions of the division's public rule-making docket containing entries relating to the rule or the proceeding upon which the rule is based;

c. All written petitions, requests, and submissions received by the division, and all other written materials of a factual nature as distinguished from opinion that are relevant to the merits of the rule and that were created or compiled by the division and considered by the labor commissioner, in connection with the formulation, proposal, or adoption of the rule or the proceeding upon which the rule is based, except to the extent the division is authorized by law to keep them confidential; provided, however, that when any such materials are deleted because they are authorized by law to be kept confidential, the division will identify in the record the particular materials deleted and state the reasons for that deletion;

d. Any official transcript of oral presentations made in the proceeding upon which the rule is based or, if not transcribed, the stenographic record or electronic recording of those presentations, and any memorandum prepared by a presiding officer summarizing the contents of those presentations;

e. A copy of any regulatory analysis or fiscal impact statement prepared for the proceeding upon which the rule is based;

f. A copy of the rule and any concise statement of reasons prepared for that rule;

g. All petitions for amendments of, or repeal or suspension of, the rule;

h. A copy of any objection to the issuance of that rule without public notice and participation that was filed pursuant to Iowa Code section 17A.4(2) by the administrative rules review committee, the governor, or the attorney general;

i. A copy of any objection to the rule filed by the administrative rules review committee, the governor, or the attorney general pursuant to Iowa Code section 17A.4(4), and any agency response to that objection; and

j. A copy of any executive order concerning the rule.

**1.43(3) Effect of record.** Except as otherwise required by a provision of law, the division rule-making record required by this rule may not constitute the exclusive basis for division action on that rule.

**1.43(4) Significant written criticisms.** Written criticisms of a rule may be submitted to the division and directed to the Division of Labor Services, Division Rules Coordinator, 1000 East Grand, Des Moines, Iowa 50319. A criticism of a specific rule must be more than a mere lack of understanding of a rule or a dislike regarding the rule. To constitute a criticism of a rule, the criticism must be in writing, state it is a criticism of a specific rule, state the rule number, and provide reasons for criticism of the rule. All written rule criticisms received will be kept in a separate record for a period of five years.

**1.43(5) Maintenance of record.** The division will maintain the rule-making record for a period of not less than five

years from the later of the date the rule to which it pertains became effective, the date of the Notice of Intended Action, or the date of any written criticism as described in 1.43(2) "g," "h," "i," or "j."

**875—1.44(17A) Filing of rules.** The division will file each rule it adopts in the office of the administrative rules coordinator. The filing must be executed as soon after adoption of the rule as is practicable. At the time of filing, each rule must have attached to it any fiscal note impact statement and any concise statement of reasons that was issued with respect to that rule. If a fiscal note impact statement or statement of reasons for that rule was not issued until a time subsequent to the filing of that rule, the note or statement must be attached to the filed rule within five working days after the note or statement is issued. In filing a rule, the division will use the standard form prescribed by the administrative rules coordinator.

**875—1.45(17A) Effectiveness of rules prior to publication.**

**1.45(1) Grounds.** The division may make a rule effective after its filing at any stated time prior to 35 days after its indexing and publication in the Iowa Administrative Bulletin if it finds that a statute so provides, the rule confers a benefit or removes a restriction on some segment of the public, or that the effective date of the rule is necessary to avoid imminent peril to the public health, safety, or welfare. The division will incorporate the required finding and a brief statement of its supporting reasons in each rule adopted in reliance upon this subrule.

**1.45(2) Special notice.** When the division makes a rule effective prior to its indexing and publication in reliance upon the provisions of Iowa Code section 17A.5(2)"b"(3), the division will employ all reasonable efforts to make its contents known to the persons who may be affected by that rule prior to the rule's indexing and publication. The term "all reasonable efforts" requires the division to employ the most effective and prompt means of notice rationally calculated to inform potentially affected parties of the effectiveness of the rule that is justified and practical under the circumstances considering the various alternatives available for this purpose, the comparative costs to the division of utilizing each of those alternatives, and the harm suffered by affected persons from any lack of notice concerning the contents of the rule prior to its indexing and publication. The means that may be used for providing notice of rules prior to their indexing and publication include, but are not limited to, any one or more of the following means: radio, newspaper, television, signs, mail, telephone, or personal notice or electronic means.

A rule made effective prior to its indexing and publication in reliance upon the provisions of Iowa Code section 17A.5(2)"b"(3) shall include in that rule a statement describing the reasonable efforts that will be used to comply with the requirements of subrule 1.45(2).

**875—1.46(17A) General statements of policy.**

**1.46(1) Compilation, indexing, public inspection.** The division will maintain an official, current, and dated compilation that is indexed by subject, containing all of its general statements of policy within the scope of Iowa Code section 17A.2(10)"a," "c," "f," "g," "h," "k." Each addition to, change in, or deletion from the official compilation must also be dated, indexed, and a record thereof kept. Except for those portions containing rules governed by Iowa Code section 17A.2(7)"f," or otherwise authorized by law to be kept confidential, the compilation must be made available for public inspection and copying.

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1.46(2) Enforcement of requirements. A general statement of policy subject to the requirements of this subrule shall not be relied on by the division to the detriment of any person who does not have actual, timely knowledge of the contents of the statement until the requirements of subrule 1.46(1) are satisfied. This provision is inapplicable to the extent necessary to avoid imminent peril to the public health, safety, or welfare.

875—1.47(17A) Review by agency of rules.

1.47(1) Any interested person, association, agency, or political subdivision may submit a written request to the administrative rules coordinator requesting the division to conduct a formal review of a specified rule. Upon approval of that request by the administrative rules coordinator, the division will conduct a formal review of a specified rule to determine whether a new rule should be adopted instead or the rule should be amended or repealed. The division may refuse to conduct a review if it has conducted such a review of the specified rule within five years prior to the filing of the written request.

1.47(2) In conducting the formal review, the division will prepare within a reasonable time a written report summarizing its findings, its supporting reasons, and any proposed course of action. The report must include a concise statement of the division's findings regarding the rule's effectiveness in achieving its objectives, including a summary of any available supporting data. The report shall also concisely describe significant written criticisms of the rule received during the previous five years, including a summary of any petitions for waiver of the rule received by the division or granted by the division. The report shall describe alternative solutions to resolve the criticisms of the rule, the reasons any were rejected, and any changes made in the rule in response to the criticisms as well as the reasons for the changes. A copy of the division's report shall be sent to the administrative review committee and the administrative rules coordinator. The report must also be available for public inspection.

875—1.48 and 1.49 Reserved.

DIVISION IV  
DECLARATORY ORDERS

875—1.50(17A) Petition for declaratory order. Any person may file a petition with the division for a declaratory order as to the applicability to specified circumstances of a statute, rule, or order within the primary jurisdiction of the division. A petition is deemed filed when it is received by the division. The division shall provide the petitioner with a file-stamped copy of the petition if the petitioner provides the division an extra copy for this purpose. The petition must be typewritten or legibly handwritten in ink and must substantially conform to the following form.

DIVISION OF LABOR SERVICES

Petition by (Name of Petitioner)  
for a Declaratory Order on (Cite  
provisions of law involved).



PETITION FOR  
DECLARATORY  
ORDER

The petition must provide the following information:

1. A clear and concise statement of all relevant facts on which the order is requested.
2. A citation and the relevant language of the specific statutes, rules, policies, decisions, or orders, whose applicability is questioned, and any other relevant law.
3. The questions petitioner wants answered, stated clearly and concisely.
4. The answers to the questions desired by the petitioner and a summary of the reasons urged by the petitioner in support of those answers.
5. The reasons for requesting the declaratory order and disclosure of the petitioner's interest in the outcome.
6. A statement indicating whether the petitioner is currently a party to another proceeding involving the questions at issue and whether, to the petitioner's knowledge, those questions have been decided by, are pending determination by, or are under investigation by, any governmental entity.
7. The names and addresses of other persons, or a description of any class of persons, known by petitioner to be affected by, or interested in, the questions presented in the petition.
8. Any request by petitioner for a meeting provided for by rule 1.53(17A).

The petition must be dated and signed by the petitioner or the petitioner's representative. It must also include the name, mailing address, and telephone number of the petitioner and petitioner's representative, and a statement indicating the person to whom communications concerning the petition should be directed.

875—1.51(17A) Notice of petition. Within 15 days after receipt of a petition for a declaratory order, the division shall give notice of the petition to all persons not served by the petitioner pursuant to rule 1.55(17A) to whom notice is required by any provision of law. The division may also give notice to any other persons.

875—1.52(17A) Intervention.

1.52(1) Persons who qualify under any applicable provision of law as an intervenor and who file a petition for intervention within 20 days of the filing of a petition for declaratory order shall be allowed to intervene in a proceeding for a declaratory order.

1.52(2) Any person who files a petition for intervention at any time prior to the issuance of an order may be allowed to intervene in a proceeding for a declaratory order at the discretion of the division.

1.52(3) A petition for intervention shall be filed at the Division of Labor Services, 1000 East Grand Avenue, Des Moines, Iowa 50319. The petition is deemed filed when it is received by that office. The division will provide the petitioner with a file-stamped copy of the petition for intervention if the petitioner provides an extra copy for this purpose. A petition for intervention must be typewritten or legibly handwritten in ink and must substantially conform to the following form:

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## DIVISION OF LABOR SERVICES

Petition by (Name of Original Petitioner) for a Declaratory Order on (Cite provisions of law cited in original petition).

PETITION FOR INTERVENTION

The petition for intervention must provide the following information:

1. Facts supporting the intervenor's standing and qualifications for intervention.

2. The answers urged by the intervenor to the question or questions presented and a summary of the reasons urged in support of those answers.

3. Reasons for requesting intervention and disclosure of the intervenor's interest in the outcome.

4. A statement indicating whether the intervenor is currently a party to any proceeding involving the questions at issue and whether, to the intervenor's knowledge, those questions have been decided by, are pending determination by, or are under investigation by, any governmental entity.

5. The names and addresses of any additional persons, or a description of any additional class of persons, known by the intervenor to be affected by, or interested in, the questions presented.

6. Whether the intervenor consents to be bound by the determination of the matters presented in the declaratory order proceeding.

The petition must be dated and signed by the intervenor or the intervenor's representative. It must also include the name, mailing address, and telephone number of the intervenor and intervenor's representative, and a statement indicating the person to whom communications should be directed.

**875—1.53(17A) Briefs.** The petitioner or any intervenor may file a brief in support of the position urged. The division may request a brief from the petitioner, any intervenor, or any other person concerning the questions raised.

**875—1.54(17A) Inquiries.** Inquiries concerning the status of a declaratory order proceeding may be made to the Declaratory Orders Coordinator, Division of Labor Services, 1000 East Grand Avenue, Des Moines, Iowa 50319.

**875—1.55(17A) Service and filing of petitions and other papers.**

**1.55(1)** When service required. Except where otherwise provided by law, every petition for declaratory order, petition for intervention, brief, or other paper filed in a proceeding for a declaratory order shall be served upon each of the parties of record to the proceeding, and on all other persons identified in the petition for declaratory order or petition for intervention as affected by or interested in the questions presented, simultaneously with their filing. The party filing a document is responsible for service on all parties and other affected or interested persons.

**1.55(2)** Filing—when required. All petitions for declaratory orders, petitions for intervention, briefs, or other papers in a proceeding for a declaratory order shall be filed with the Declaratory Orders Coordinator, Division of Labor Services, 1000 East Grand Avenue, Des Moines, Iowa 50319. All petitions, briefs, or other papers that are required to be served upon a party shall be filed simultaneously with the division.

**1.55(3)** Method of service, time of filing, and proof of mailing. Method of service, time of filing, and proof of mailing shall be as provided by rule 875—1.76(17A).

**875—1.56(17A) Consideration.** Upon request by petitioner, the division shall schedule a brief and informal meeting between the original petitioner, all intervenors, or a member of the staff of the division, to discuss the questions raised. The division may solicit comments from any person on the questions raised. Also, comments on the questions raised may be submitted to the division by any person.

**875—1.57(17A) Action on petition.**

**1.57(1)** Within the time allowed by 1998 Iowa Acts, chapter 1202, section 13(5), after receipt of a petition for a declaratory order, the labor commissioner or designee shall take action on the petition as required by 1998 Iowa Acts, chapter 1202, section 13(5).

**1.57(2)** The date of issuance of an order or of a refusal to issue an order is as defined in rule 875—1.66(17A).

**875—1.58(17A) Refusal to issue order.**

**1.58(1)** The division shall not issue a declaratory order where prohibited by 1998 Iowa Acts, chapter 1202, section 13(1), and may refuse to issue a declaratory order on some or all questions raised for the following reasons:

1. The petition does not substantially comply with the required form.

2. The petition does not contain facts sufficient to demonstrate that the petitioner will be aggrieved or adversely affected by the failure of the division to issue an order.

3. The division does not have jurisdiction over the questions presented in the petition.

4. The questions presented by the petition are also presented in a current rule making, contested case, or other division or judicial proceeding, that may definitively resolve them.

5. The questions presented by the petition would more properly be resolved in a different type of proceeding or by another body with jurisdiction over the matter.

6. The facts or questions presented in the petition are unclear, overbroad, insufficient, or otherwise inappropriate as a basis upon which to issue an order.

7. There is no need to issue an order because the questions raised in the petition have been settled due to a change in circumstances.

8. The petition is not based upon facts calculated to aid in the planning of future conduct but is, instead, based solely upon prior conduct in an effort to establish the effect of that conduct or to challenge a division decision already made.

9. The petition requests a declaratory order that would necessarily determine the legal rights, duties, or responsibilities of other persons who have not joined in the petition, intervened separately, or filed a similar petition and whose position on the questions presented may fairly be presumed to be adverse to that of petitioner.

10. The petitioner requests the division to determine whether a statute is unconstitutional on its face.

**1.58(2)** A refusal to issue a declaratory order must indicate the specific grounds for the refusal and constitutes final agency action on the petition.

**1.58(3)** Refusal to issue a declaratory order pursuant to this provision does not preclude the filing of a new petition that seeks to eliminate the grounds for the refusal to issue a ruling.

**875—1.59(17A) Contents of declaratory order—effective date.** In addition to the ruling itself, a declaratory order must contain the date of its issuance, the name of petitioner and all intervenors, the specific statutes, rules, policies, decisions, or orders involved, the particular facts upon which it is based, and the reasons for its conclusion.

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A declaratory order is effective on the date of issuance.

**875—1.60(17A) Copies of orders.** A copy of all orders issued in response to a petition for a declaratory order shall be mailed promptly to the original petitioner and all intervenors.

**875—1.61(17A) Effect of a declaratory order.** A declaratory order has the same status and binding effect as a final order issued in a contested case proceeding. It is binding on the division, the petitioner, and any intervenors (who consent to be bound) and is applicable only in circumstances where the relevant facts and the law involved are indistinguishable from those on which the order was based. As to all other persons, a declaratory ruling serves only as precedent and is not binding on the division. The issuance of a declaratory order constitutes final agency action on the petition.

**875—1.62 to 1.64** Reserved.

ITEM 4. Adopt a new Division V as follows:

DIVISION V  
CONTESTED CASES

**875—1.65(17A) Scope and applicability.** This division applies to contested case proceedings conducted by the division of labor services. Rules of the employment appeal board are applicable for some contested cases regarding boiler safety, elevator safety, and occupational safety and health inspections and contractor registration investigations.

**875—1.66(17A) Definitions.** Except where otherwise specifically defined by law:

“Contested case” means a proceeding defined by Iowa Code section 17A.2(5) and includes a no factual dispute contested case under 1998 Iowa Acts, chapter 1202, section 14.

“Issuance” means the date of mailing of a decision or order or date of delivery if service is by other means unless another date is specified in the order.

“Party” means each person or agency named or admitted as a party or properly seeking and entitled as of right to be admitted as a party.

“Presiding officer” means the labor commissioner or designee.

“Proposed decision” means the presiding officer’s recommended findings of fact, conclusions of law, decision, and order in a contested case in which the division of labor services did not preside.

**875—1.67(17A) Time requirements.**

**1.67(1)** Time shall be computed as provided in Iowa Code subsection 4.1(34).

**1.67(2)** For good cause, the presiding officer may extend or shorten the time to take any action, except as precluded by statute. Except for good cause stated in the record, before extending or shortening the time to take any action, the presiding officer shall afford all parties an opportunity to be heard or to file written arguments.

**875—1.68(17A) Requests for contested case proceeding.** Any person claiming an entitlement to a contested case proceeding shall file a written request for such a proceeding within the time specified by the particular rules or statutes governing the subject matter or, in the absence of such law, the time specified in the division’s action in question.

The request for a contested case proceeding should state the name and address of the requester, identify the specific division action which is disputed, and include a short and plain statement of the issues of material fact in dispute. If the requester is represented by a lawyer, identify the provisions

of law or precedent requiring or authorizing the holding of a contested case proceeding in the particular circumstances involved.

**875—1.69(17A) Notice of hearing.**

**1.69(1) Delivery.** Delivery of the notice of hearing constitutes the commencement of the contested case proceeding. Delivery may be executed by:

- a. Personal service as provided in the Iowa Rules of Civil Procedure;
- b. Certified mail, return receipt requested;
- c. First-class mail;
- d. Publication, as provided in the Iowa Rules of Civil Procedure; or
- e. If requested, by facsimile, or electronic transmission.

**1.69(2) Contents.** The notice of hearing shall contain the following information:

- a. A statement of the time, place, and nature of the hearing;
- b. A statement of the legal authority and jurisdiction under which the hearing is to be held;
- c. A reference to the particular sections of the statutes and rules involved;
- d. A short and plain statement of the matters asserted. If the division or other party is unable to state the matters in detail at the time the notice is served, the initial notice may be limited to a statement of the issues involved. Thereafter, upon application, a more definite and detailed statement shall be furnished;

e. Identification of all parties including the name, address and telephone number of the person who will act as attorney for the commissioner or division and of parties’ counsel where known;

f. Reference to the procedural rules governing conduct of the contested case proceeding;

g. Reference to the procedural rules governing informal settlement. The parties are encouraged to meet informally to resolve issues that might culminate in a resolution of issues in the contested case;

h. Identification of the presiding officer, if known. If not known, a description of who will serve as presiding officer;

i. A statement that a party, at its own expense, may be represented by counsel in the contested case; and

j. Notification of the time period in which a party may request, pursuant to 1998 Iowa Acts, chapter 1202, section 15(1), and rule 1.70(17A), that the presiding officer be an administrative law judge.

**875—1.70(17A) Presiding officer.**

**1.70(1)** Any party who wishes to request that the presiding officer assigned to render a proposed decision be an administrative law judge employed by the department of inspections and appeals must file a written request within 20 days, or such other time period as the order may prescribe, after service of a notice of hearing which identifies or describes the presiding officer as the labor commissioner.

**1.70(2)** The division may deny the request only upon a finding that one or more of the following apply:

a. Neither the division nor the commissioner under whose authority the contested case is to take place is a named party to the proceeding or a real party in interest to that proceeding.

b. There is a compelling need to expedite issuance of a final decision in order to protect the public health, safety, or welfare.

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c. The case involves significant policy issues of first impression that are inextricably intertwined with the factual issues presented.

d. The demeanor of the witnesses is likely to be dispositive in resolving the disputed factual issues.

e. Funds are unavailable to pay the costs of an administrative law judge and an interagency appeal.

f. The request was not timely filed.

g. The request is not consistent with a specified statute.

**1.70(3)** The division will issue a written ruling specifying the grounds for its decision within 20 days after a request for an administrative law judge is filed.

**1.70(4)** Except as provided otherwise by another provision of law, all rulings by an administrative law judge acting as presiding officer are subject to appeal to the commissioner. A party must seek any available intra-agency appeal in order to exhaust adequate administrative remedies.

**1.70(5)** Unless otherwise provided by law, the commissioner, when reviewing a proposed decision upon intra-agency appeal, shall have the powers of and shall comply with the provisions of this division which apply to presiding officers.

**875—1.71(17A) Waiver of procedures.** Unless otherwise precluded by law, the parties in a contested case proceeding may waive any provision of this division. However, the division in its discretion may refuse to give effect to such a waiver when it deems the waiver to be inconsistent with the public interest.

**875—1.72(17A) Disqualification.**

**1.72(1)** A presiding officer or other person shall withdraw from participation in the making of any proposed or final decision in a contested case if that person:

a. Has a personal bias or prejudice concerning a party or a representative of a party;

b. Has personally investigated, prosecuted or advocated, in connection with that case, the specific controversy underlying that case, or another pending factually related contested case, or a pending factually related controversy that may culminate in a contested case involving the same parties;

c. Is subject to the authority, direction or discretion of any person who has personally investigated, prosecuted or advocated in connection with that contested case, the specific controversy underlying that contested case, or a pending factually related contested case or controversy involving the same parties;

d. Has acted as counsel to any person who is a private party to that proceeding within the past two years;

e. Has a personal financial interest in the outcome of the case or any other significant personal interest that could be substantially affected by the outcome of the case;

f. Has a spouse or relative within the third degree of relationship that (1) is a party to the case, or an officer, director or trustee of a party; (2) is a lawyer in the case; (3) is known to have an interest that could be substantially affected by the outcome of the case; or (4) is likely to be a material witness in the case; or

g. Has any other legally sufficient cause to withdraw from participation in the decision making in that case.

**1.72(2)** The term "personally investigated" means taking affirmative steps to interview witnesses directly or to obtain documents or other information directly. The term "personally investigated" does not include general direction and supervision of assigned investigators, unsolicited receipt of information which is relayed to assigned investigators, review

of another person's investigative work product in the course of determining whether there is probable cause to initiate a proceeding, or exposure to factual information while performing other division functions, including fact gathering for purposes other than investigation of the matter which culminates in a contested case. Factual information relevant to the merits of a contested case received by a person who later serves as presiding officer in that case shall be disclosed if required by 1998 Iowa Acts, chapter 1202, section 19(3), and subrules 1.72(3) and 1.86(9).

**1.72(3)** In a situation where a presiding officer or other person knows of information which might reasonably be deemed to be a basis for disqualification and decides voluntary withdrawal is unnecessary, that person shall submit the relevant information for the record by affidavit and shall provide for the record a statement of the reasons for the determination that withdrawal is unnecessary.

**1.72(4)** If a party asserts disqualification on any appropriate ground, including those listed in subrule 1.72(1), the party shall file a motion supported by an affidavit pursuant to 1998 Iowa Acts, chapter 1202, section 19(7). The motion must be filed as soon as practicable after the reason alleged in the motion becomes known to the party. If, during the course of the hearing, a party first becomes aware of evidence of bias or other grounds for disqualification, the party may move for disqualification but must establish the grounds by the introduction of evidence into the record.

If the presiding officer determines that disqualification is appropriate, the presiding officer or other person shall withdraw. If the presiding officer determines that withdrawal is not required, the presiding officer shall enter an order to that effect. A party asserting disqualification may seek an interlocutory appeal under rule 1.88(17A) and seek a stay under rule 1.93(17A).

**875—1.73(17A) Consolidation—severance.**

**1.73(1)** Consolidation. The presiding officer may consolidate any or all matters at issue in two or more contested case proceedings where (a) the matters at issue involve common parties or common questions of fact or law; (b) consolidation would expedite and simplify consideration of the issues involved; and (c) consolidation would not adversely affect the rights of any of the parties to those proceedings.

**1.73(2)** Severance. The presiding officer may, for good cause shown, order any contested case proceedings or portions thereof severed.

**875—1.74(17A) Answer.**

**1.74(1)** Answer.

a. Any answer required in a contested case proceeding shall be filed within 20 days of delivery of the notice of hearing or subsequent order of the presiding officer, unless otherwise ordered.

b. An answer shall state in separately numbered paragraphs the following:

(1) The persons or entities on whose behalf the petition is filed;

(2) The particular provisions of statutes and rules involved;

(3) The relief demanded and the facts and law relied upon for such relief; and

(4) The name, address and telephone number of the party and the party's attorney, if any.

c. A party may move to dismiss or apply for a more definite and detailed statement when appropriate.

An answer shall show on whose behalf it is filed and specifically admit, deny, or otherwise answer all material al-

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legations of the notice of hearing. It shall state any facts deemed to show an affirmative defense and contain as many additional defenses as the pleader may claim.

Any allegation in the notice of hearing not denied in the answer is considered admitted. The presiding officer may refuse to consider any defense not raised in the answer which could have been raised on the basis of facts known when the answer was filed if any party would be prejudiced.

**1.74(2) Amendment.** Any notice of hearing, answer, or other charging document may be amended before a responsive pleading has been filed. Amendments to pleadings after a responsive pleading has been filed and to an answer may be allowed with the consent of the other parties or in the discretion of the presiding officer who may impose terms or grant a continuance.

**875—1.75(17A) Pleadings, service and filing.**

**1.75(1) Pleadings** may be required by rule, by the notice of hearing, or by order of the presiding officer.

**1.75(2) When service is required.** Except where otherwise provided by law, every pleading, motion, document, or other paper filed in a contested case proceeding and every paper relating to discovery in a proceeding shall be served upon each of the parties of record to the proceeding, including the person designated as attorney for the division, simultaneously with their filing. Except for the original notice of hearing and an application for rehearing as provided in Iowa Code section 17A.16(2), the party filing a document is responsible for service on all parties.

**1.75(3) How service is made.** Service upon a party represented by an attorney shall be made upon the attorney unless otherwise ordered. Service is made by delivery or by mailing a copy to the person's last-known address. Service by mail is complete upon mailing, except where otherwise specifically provided by statute, rule, or order.

**1.75(4) When filing is required.** After the notice of hearing, all pleadings, motions, documents or other papers in a contested case proceeding shall be filed with the division at 1000 East Grand Avenue, Des Moines, Iowa 50319. All pleadings, motions, documents or other papers that are required to be served upon a party shall be filed simultaneously with the division.

**1.75(5) When filing is made.** Except where otherwise provided by law, a document is deemed filed at the time it is delivered to the division, delivered to an established courier service for immediate delivery to the division, or mailed by first-class mail or state interoffice mail to the division, so long as there is proof of mailing.

**1.75(6) Proof of mailing.** Proof of mailing includes either: a legible United States Postal Service postmark on the envelope, a certificate of service, a notarized affidavit, or a certification in substantially the following form:

I certify under penalty of perjury and pursuant to the laws of Iowa that, on (date of mailing), I mailed copies of (describe document) addressed to the Division of Labor Services, 1000 East Grand Avenue, Des Moines, Iowa 50319, and to the names and addresses of the parties listed below by depositing the same in (state: a United States post office mailbox with correct postage properly affixed, state interoffice mail, courier).

(Date)

(Signature)

**875—1.76(17A) Discovery.**

**1.76(1) Discovery procedures** applicable in civil actions are applicable in contested cases. Unless lengthened or shortened by an order of the presiding officer, time periods

for compliance with discovery shall be as provided in the Iowa Rules of Civil Procedure.

**1.76(2) Any motion** relating to discovery shall allege that the moving party has previously made a good-faith attempt to resolve the discovery issues involved with the opposing party. Motions in regard to discovery shall be ruled upon by the presiding officer. Opposing parties shall be afforded the opportunity to respond within ten days of the filing of the motion unless the time is shortened as provided in subrule 1.76(1). The presiding officer may rule on the basis of the written motion and any response, or may order argument on the motion.

**1.76(3) Evidence** obtained in discovery may be used in the contested case proceeding if that evidence would otherwise be admissible in that proceeding.

**875—1.77(17A) Subpoenas.**

**1.77(1) Issuance.**

a. A division subpoena shall be issued to a party upon written request. The request shall include the name, address, and telephone number of the requesting party. In the absence of good cause for permitting later action, a request for a subpoena must be received at least three days before the scheduled hearing.

b. Except to the extent otherwise provided by law, parties are responsible for service of their own subpoenas and payment of witness fees and mileage expenses.

**1.77(2) Motion to quash or modify.** The presiding officer may quash or modify a subpoena for any lawful reason upon motion in accordance with the Iowa Rules of Civil Procedure. A motion to quash or modify a subpoena shall be set for argument promptly.

**875—1.78(17A) Motions.**

**1.78(1) No technical form** for motions is required. However, prehearing motions must be in writing, state the grounds for relief, and state the relief sought, unless otherwise permitted by the presiding officer.

**1.78(2) Any party** may file a written response to a motion within ten days after the motion is served, unless the time period is extended or shortened by the presiding officer. The presiding officer may consider a failure to respond within the required time period in ruling on a motion.

**1.78(3) The presiding officer** may schedule oral argument on any motion.

**1.78(4) Motions** pertaining to the hearing, except motions for summary judgment, must be filed and served at least ten days prior to the date of hearing unless there is good cause for permitting later action or the time for such action is lengthened or shortened by an order of the presiding officer.

**1.78(5) Motions for summary judgment.** Motions for summary judgment shall comply with the requirements of Iowa Rule of Civil Procedure 237 and shall be subject to disposition according to the requirements of that rule to the extent such requirements are not inconsistent with the provisions of this rule or any other provision of law governing the procedure in contested cases.

Motions for summary judgment must be filed and served at least 45 days prior to the scheduled hearing date, or other time period determined by the presiding officer. Any party resisting the motion shall file and serve a resistance within 15 days, unless otherwise ordered by the presiding officer, from the date a copy of the motion was served. The time fixed for hearing or nonoral submission shall be not less than 20 days after the filing of the motion, unless a shorter time is ordered by the presiding officer. A summary judgment order rendered on all issues in a contested case is subject to rehear-

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ing pursuant to rule 1.92(17A) and appeal pursuant to rule 1.91(17A).

**875—1.79(17A) Prehearing conference.** For good cause the presiding officer may permit variances from this rule.

**1.79(1)** Any party may request a prehearing conference. A written request for prehearing conference or an order for prehearing conference on the presiding officer's own motion shall be filed not less than seven days prior to the hearing date. A prehearing conference shall be scheduled not less than three business days prior to the hearing date.

Written notice of the prehearing conference shall be given by the presiding officer to all parties.

**1.79(2)** Each party shall bring to the prehearing conference:

a. A final list of the witnesses who the party anticipates will testify at the hearing. Witnesses not listed may be excluded from testifying unless there was good cause for the failure to include their names; and

b. A final list of exhibits which the party anticipates will be introduced at the hearing. Exhibits other than rebuttal exhibits that are not listed may be excluded from admission into evidence unless there was good cause for the failure to include them.

Witness or exhibit lists may be amended subsequent to the prehearing conference within the time limits established by the presiding officer at the prehearing conference. Any such amendments must be served on all parties.

**1.79(3)** In addition to the requirements of subrule 1.79(2), the parties at a prehearing conference may:

- a. Enter into stipulations of law or fact;
- b. Enter into stipulations on the admissibility of exhibits;
- c. Identify matters which the parties intend to request be officially noticed;
- d. Enter into stipulations for waiver of any provision of law; and
- e. Consider any additional matters which will expedite the hearing.

**1.79(4)** Prehearing conferences shall be conducted by telephone unless otherwise ordered. Parties shall exchange and receive witness and exhibit lists in advance of a telephone prehearing conference.

**875—1.80(17A) Continuances.** Unless otherwise provided, applications for continuances shall be made to the presiding officer.

**1.80(1)** A written application for a continuance shall:

- a. Be made at the earliest possible time and no less than seven days before the hearing except in case of unanticipated emergencies;
- b. State the specific reasons for the request; and
- c. Be signed by the requesting party or the party's representative.

An oral application for a continuance may be made if the presiding officer waives the requirement for a written motion. However, a party making an oral application for a continuance must confirm that request by written application within five days after the oral request unless that requirement is waived by the presiding officer. No application for continuance shall be made or granted without notice to all parties except in an emergency where notice is not feasible. The division may waive notice of such requests for a particular case or an entire class of cases.

**1.80(2)** In determining whether to grant a continuance, the presiding officer may consider:

- a. Prior continuances;

- b. The interests of all parties;
- c. The likelihood of informal settlement;
- d. The existence of an emergency;
- e. Any objection;
- f. Any applicable time requirements;
- g. The existence of a conflict in the schedules of counsel, parties, or witnesses;
- h. The timeliness of the request; and
- i. Other relevant factors.

The presiding officer may require documentation of any grounds for continuance.

**875—1.81(17A) Withdrawals.** A party requesting a contested case proceeding may withdraw that request prior to the hearing. Unless otherwise provided, a withdrawal shall be with prejudice.

**875—1.82(17A) Intervention.**

**1.82(1)** Motion. A motion for leave to intervene in a contested case proceeding shall state the grounds for the proposed intervention, the position and interest of the proposed intervenor, and the possible impact of intervention on the proceeding. A proposed answer or petition in intervention shall be attached to the motion. Any party may file a response within 14 days of service of the motion to intervene unless the time period is extended or shortened by the presiding officer.

**1.82(2)** When filed. Motion for leave to intervene shall be filed as early in the proceeding as possible to avoid adverse impact on existing parties or the conduct of the proceeding. Unless otherwise ordered, a motion for leave to intervene shall be filed before the prehearing conference, if any, or at least 20 days before the date scheduled for hearing. Any later motion must contain a statement of good cause for the failure to file in a timely manner.

**1.82(3)** Grounds for intervention. The movant shall demonstrate that (a) intervention would not unduly prolong the proceedings or otherwise prejudice the rights of existing parties; (b) the movant is likely to be aggrieved or adversely affected by a final order in the proceeding; and (c) the interests of the movant are not adequately represented by existing parties.

**1.82(4)** Effect of intervention. If appropriate, the presiding officer may order consolidation of the petitions and briefs of different parties whose interests are aligned with each other and limit the number of representatives allowed to participate actively in the proceedings. A person granted leave to intervene is a party to the proceeding. The order granting intervention may restrict the issues that may be raised by the intervenor or otherwise condition the intervenor's participation in the proceeding.

**1.82(5)** Nonresponsive intervenor. If a negotiated settlement is reached between all parties except the intervenor, the settlement shall be set down in writing and shall contain the various points of settlement and stipulations.

Input from intervenors may assist in the settlement of a contested case. The division will assume an intervenor does not object to a settlement if the intervenor does not respond to the division by signing the settlement or presenting written comments on the settlement within 14 days from the date the settlement is sent for signature. If the parties, other than the intervenor, wish to file the settlement over the objection of the intervenor, the parties shall attach the intervenor's written objection and a statement as to why the intervenor's objection was not acceptable to the other parties and should not block the entering of a final order.

**875—1.83(17A) Hearing procedures.**

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**1.83(1)** The presiding officer presides at the hearing, and may rule on motions, require briefs, issue a proposed decision, and issue such orders and rulings as will ensure the orderly conduct of the proceedings.

**1.83(2)** All objections shall be timely made and stated on the record.

**1.83(3)** Parties have the right to participate or to be represented in all hearings or prehearing conferences related to their case. Partnerships, corporations, or associations may be represented by any member, officer, director, or duly authorized agent. Any party may be represented by an attorney or another person authorized by law.

**1.83(4)** Subject to terms and conditions prescribed by the presiding officer, parties have the right to introduce evidence on issues of material fact, cross-examine witnesses present at the hearing as necessary for a full and true disclosure of the facts, present evidence in rebuttal, and submit briefs and engage in oral argument.

**1.83(5)** The presiding officer shall maintain the decorum of the hearing and may refuse to admit or may expel anyone whose conduct is disorderly.

**1.83(6)** Witnesses may be sequestered during the hearing.

**1.83(7)** The presiding officer shall conduct the hearing in the following manner:

a. The presiding officer shall give an opening statement briefly describing the nature of the proceedings;

b. The parties shall be given an opportunity to present opening statements;

c. Parties shall present their cases in the sequence determined by the presiding officer;

d. Each witness shall be sworn or affirmed by the presiding officer or the court reporter, and be subject to examination and cross-examination. The presiding officer may limit questioning in a manner consistent with law;

e. When all parties and witnesses have been heard, parties may be given the opportunity to present final arguments.

**1.83(8)** Telephone or video conferencing proceedings. The presiding officer may resolve preliminary procedural motions by telephone or video conference in which all parties have an opportunity to participate. Other telephone or video proceedings may be held with the consent of all parties. The presiding officer will determine the location of the parties and witnesses for telephone hearings. The convenience of the witnesses or parties, as well as the nature of the case, will be considered when location is chosen.

**875—1.84(17A) Evidence.**

**1.84(1)** The presiding officer shall rule on admissibility of evidence and may, where appropriate, take official notice of facts in accordance with all applicable requirements of law.

**1.84(2)** Stipulation of facts is encouraged. The presiding officer may make a decision based on stipulated facts.

**1.84(3)** Evidence in the proceeding shall be confined to the issues as to which the parties received notice prior to the hearing unless the parties waive their right to such notice or the presiding officer determines that good cause justifies expansion of the issues. If the presiding officer decides to admit evidence on issues outside the scope of the notice over the objection of a party who did not have actual notice of those issues, that party, upon timely request, shall receive a continuance sufficient to amend pleadings and to prepare on the additional issue.

**1.84(4)** The party seeking admission of an exhibit must provide opposing parties with an opportunity to examine the exhibit prior to the ruling on its admissibility. Copies of documents should normally be provided to opposing parties.

All exhibits admitted into evidence shall be appropriately marked and be made part of the record.

**1.84(5)** Any party may object to specific evidence or may request limits on the scope of any examination or cross-examination. Such an objection shall be accompanied by a brief statement of the grounds upon which it is based. The objection, the ruling on the objection, and the reasons for the ruling shall be noted in the record. The presiding officer may rule on the objection at the time it is made or may reserve a ruling until the written decision.

**1.84(6)** Whenever evidence is ruled inadmissible, the party offering that evidence may submit an offer of proof on the record. The party making the offer of proof for excluded oral testimony shall briefly summarize the testimony or, with permission of the presiding officer, present the testimony. If the excluded evidence consists of a document or exhibit, it shall be marked as part of an offer of proof and inserted in the record.

**875—1.85(17A) Default.**

**1.85(1)** If a party fails to appear or participate in a contested case proceeding after proper service of notice, the presiding officer may, if no adjournment is granted, enter a default decision or proceed with the hearing and render a decision in the absence of the party.

**1.85(2)** Where appropriate and not contrary to law, any party may move for default against a party who has requested the contested case proceeding and has failed to file a required pleading or has failed to appear after proper service.

**1.85(3)** Default decisions or decisions rendered on the merits after a party has failed to appear or participate in a contested case proceeding become final agency action unless (a) within 15 days after the date of notification or mailing of the decision, a motion to vacate is filed and served on all parties or (b) an appeal of a decision on the merits is timely initiated within the time provided by rule 1.91(17A). A motion to vacate must state all facts relied upon by the moving party which establish that good cause existed for that party's failure to appear or participate at the contested case proceeding. Each fact so stated must be substantiated by at least one sworn affidavit of a person with personal knowledge of each such fact. The affidavit(s) must be attached to the motion.

**1.85(4)** The time for further appeal of a decision for which a timely motion to vacate has been filed is stayed pending a decision on the motion to vacate.

**1.85(5)** Properly substantiated and timely filed motions to vacate shall be granted only for good cause shown. The burden of proof as to good cause is on the moving party. Adverse parties shall have ten days to respond to a motion to vacate. Adverse parties shall be allowed to conduct discovery as to the issue of good cause and to present evidence on the issue prior to a decision on the motion, if a request to do so is included in that party's response.

**1.85(6)** "Good cause" for purposes of this rule shall have the same meaning as "good cause" for setting aside a default judgment under Iowa Rule of Civil Procedure 236.

**1.85(7)** A decision denying a motion to vacate is subject to further appeal within the time limit allowed for further appeal of a decision on the merits in the contested case proceeding. A decision granting a motion to vacate is subject to interlocutory appeal by the adverse party pursuant to rule 1.88(17A).

**1.85(8)** If a motion to vacate is granted and no timely interlocutory appeal has been taken, the presiding officer shall issue another notice of hearing and the contested case shall proceed accordingly.

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**1.85(9)** A default decision may award any relief consistent with the request for relief made in the petition and embraced in its issues. If the defaulting party has appeared, the default decision cannot exceed the relief demanded.

**1.85(10)** A default decision may provide either that the default decision is to be stayed pending a timely motion to vacate or that the default decision is to take effect immediately, subject to a request for stay under rule 1.93(17A).

**875—1.86(17A) Ex parte communication.**

**1.86(1)** Prohibited communications. Unless required for the disposition of ex parte matters specifically authorized by statute, following issuance of the notice of hearing, there shall be no communication, directly or indirectly, between the presiding officer and any party or representative of any party or any other person with a direct or indirect interest in the case in connection with any issue of fact or law in the case except upon notice and opportunity for all parties to participate. This does not prohibit persons jointly assigned such tasks from communicating with each other. Nothing in this provision is intended to preclude the presiding officer from communicating with members of the division or seeking the advice or help of persons other than those with a personal interest in, or those engaged in personally investigating as defined in subrule 1.72(2), prosecuting, or advocating in, either the case under consideration or a pending factually related case involving the same parties as long as those persons do not directly or indirectly communicate to the presiding officer any ex parte communications they have received of a type that the presiding officer would be prohibited from receiving or that furnish, augment, diminish, or modify the evidence in the record.

**1.86(2)** Prohibitions on ex parte communications commence with the issuance of the notice of hearing in a contested case and continue for as long as the case is pending.

**1.86(3)** Written, oral or other forms of communication are "ex parte" if made without notice and opportunity for all parties to participate.

**1.86(4)** To avoid prohibited ex parte communications, notice must be given in a manner reasonably calculated to give all parties a fair opportunity to participate. Notice of written communications shall be provided in compliance with rule 1.75(17A) and may be supplemented by telephone, facsimile, electronic mail or other means of notification. Where permitted, oral communications may be initiated through conference telephone calls including all parties or their representatives.

**1.86(5)** Persons who jointly act as presiding officer in a pending contested case may communicate with each other without notice or opportunity for parties to participate.

**1.86(6)** The commissioner and other persons may be present in deliberations or otherwise advise the presiding officer without notice or opportunity for parties to participate as long as they are not disqualified from participating in the making of a proposed or final decision under any provision of law and they comply with subrule 1.86(1).

**1.86(7)** Communications with the presiding officer involving uncontested scheduling or procedural matters do not require notice or opportunity for parties to participate. Parties should notify other parties prior to initiating such contact with the presiding officer when feasible and shall notify other parties when seeking to continue hearings or other deadlines pursuant to rule 1.80(17A).

**1.86(8)** Disclosure of prohibited communications. A presiding officer who receives a prohibited ex parte communication during the pendency of a contested case must initially determine if the effect of the communication is so prejudi-

cial that the presiding officer should be disqualified. If the presiding officer determines that disqualification is warranted, a copy of any prohibited written communication, all written responses to the communication, a written summary stating the substance of any prohibited oral or other communication not available in written form for disclosure, all responses made, and the identity of each person from whom the presiding officer received a prohibited ex parte communication shall be submitted for inclusion in the record under seal by protective order or disclosed. If the presiding officer determines that disqualification is not warranted, such documents shall be submitted for inclusion in the record and served on all parties. Any party desiring to rebut the prohibited communication must be allowed the opportunity to do so upon written request filed within ten days after notice of the communication.

**1.86(9)** Promptly after being assigned to serve as presiding officer at any stage in a contested case proceeding, a presiding officer shall disclose to all parties material factual information received through ex parte communication prior to such assignment unless the factual information has already been or shortly will be disclosed pursuant to Iowa Code section 17A.13(2) or through discovery. Factual information contained in an investigative report or similar document need not be separately disclosed by the presiding officer as long as such documents have been or will shortly be provided to the parties.

**1.86(10)** The presiding officer may render a proposed or final decision imposing appropriate sanctions for violations of this rule including default, a decision against the offending party, censure, or suspension or revocation of the privilege to practice before the division. Violation of ex parte communication prohibitions by division personnel shall be reported to the commissioner for possible sanctions including censure, suspension, dismissal, or other disciplinary action.

**875—1.87(17A) Recording costs.** Upon request, the division shall provide a copy of the whole or any portion of the record at cost. The cost of preparing a copy of the record or of transcribing the hearing record shall be paid by the requesting party.

Parties who request that a hearing be recorded by certified shorthand reporters rather than by electronic means shall bear the cost of that recordation, unless otherwise provided by law.

**875—1.88(17A) Interlocutory appeals.** Upon written request of a party or on its own motion, the commissioner may review an interlocutory order. In determining whether to do so, the commissioner shall weigh the extent to which the granting of the interlocutory appeal would expedite final resolution of the case and the extent to which review of that interlocutory order at the time it reviews the proposed decision of the presiding officer would provide an adequate remedy. Any request for interlocutory review must be filed within 14 days of issuance of the challenged order, but no later than the time for compliance with the order or the date of hearing, whichever is first.

**875—1.89(17A) Final decision—nonlicense decision.**

**1.89(1)** When the commissioner presides over the reception of evidence at the hearing, the commissioner's decision is a final decision.

**1.89(2)** When the commissioner does not preside at the reception of evidence, the presiding officer shall make a proposed decision. The proposed decision becomes the final decision of the division without further proceedings unless

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there is an appeal to, or review on motion of, the commissioner within the time provided in rule 1.91(17A).

**1.89(3)** A settlement agreement, when signed by parties and the commissioner or presiding officer, is binding on all parties.

**875—1.90(17A) Final decision—license decision.** In addition to the requirements of rule 1.89(17A), options are available for a final decision in a case involving a license, permit, registration, commission, or similar authorization. The decision may include the following:

1. Exoneration.
2. Revocation of license.
3. Suspension of license until further order or for a specific period.
4. Nonrenewal of license.
5. Prohibited permanently from engaging in specified procedures or practices until further order or for a specific period.
6. Probation.
7. Require additional education or training.
8. Require reexamination.
9. Order a physical examination.
10. Impose civil penalty.
11. Issue citation.
12. Such other sanctions allowed by law as may be appropriate.

**875—1.91(17A) Appeals and review.**

**1.91(1)** Appeal by party. Any adversely affected party may appeal a proposed decision to the commissioner within 30 days after issuance of the proposed decision.

**1.91(2)** Review. The commissioner may initiate review of a proposed decision on the commissioner's own motion at any time within 30 days following the issuance of such a decision.

**1.91(3)** Notice of appeal. An appeal of a proposed decision is initiated by filing a timely notice of appeal with the division. The notice of appeal must be signed by the appealing party or a representative of that party and contain a certificate of service. The notice shall specify:

- a. The parties initiating the appeal;
- b. The proposed decision or order appealed from;
- c. The specific findings or conclusions to which exception is taken and any other exceptions to the decision or order;
- d. The relief sought; and
- e. The grounds for relief.

**1.91(4)** Requests to present additional evidence. A party may request the taking of additional evidence only by establishing that the evidence is material, that good cause existed for the failure to present the evidence at the hearing, and that the party has not waived the right to present the evidence. A written request to present additional evidence must be filed with the notice of appeal or, by a nonappealing party, within 14 days of service of the notice of appeal. The commissioner may remand a case to the presiding officer for further hearing or may itself preside at the taking of additional evidence.

**1.91(5)** Scheduling. The division shall issue a schedule for consideration of the appeal.

**1.91(6)** Briefs and arguments. Unless otherwise ordered, within 20 days of the notice of appeal or order for review, each appealing party may file exceptions and briefs. Within 20 days thereafter, any party may file a responsive brief. Briefs shall cite any applicable legal authority and specify relevant portions of the record in that proceeding. Written requests to present oral argument shall be filed with the

briefs. The commissioner may resolve the appeal on the briefs or provide an opportunity for oral argument. The commissioner may shorten or extend the briefing period as appropriate.

**875—1.92(17A) Applications for rehearing.**

**1.92(1)** By whom filed. Any party to a contested case proceeding may file an application for rehearing from a final order.

**1.92(2)** Content of application. The application for rehearing shall state on whose behalf it is filed, the specific grounds for rehearing, and the relief sought. In addition, the application shall state whether the applicant desires reconsideration of all or part of the division's decision on the existing record and whether, on the basis of the grounds enumerated in subrule 1.91(4), the applicant requests an opportunity to submit additional evidence.

**1.92(3)** Time of filing. The application shall be filed with the division within 20 days after issuance of the final decision.

**1.92(4)** Notice to other parties. A copy of the application shall be timely mailed by the applicant to all parties of record not joining therein. If the applicant does not contain a certificate of service, the division shall serve copies on all parties.

**1.92(5)** Disposition. Any application for a rehearing shall be deemed denied unless the division grants the application within 20 days after its filing.

**875—1.93(17A) Stays of agency actions.**

**1.93(1)** When available.

a. Any party to a contested case proceeding may petition the division for a stay of an order issued in that proceeding or for other temporary remedies, pending review by the division. The petition shall be filed with the notice of appeal and shall state the reasons justifying a stay or other temporary remedy. The commissioner may rule on the stay or authorize the presiding officer to do so.

b. Any party to a contested case proceeding may petition the division for a stay or other temporary remedies pending judicial review of all or part of that proceeding. The petition shall state the reasons justifying a stay or other temporary remedy.

**1.93(2)** When granted. In determining whether to grant a stay, the presiding officer or the commissioner shall consider the factors listed in 1998 Iowa Acts, chapter 1202, section 23(5c).

**1.93(3)** Vacation. A stay may be vacated by the issuing authority upon application of the division or any other party.

**875—1.94(17A) No factual dispute contested cases.** If the parties agree that no dispute of material fact exists as to a matter that would be a contested case if such a dispute of fact existed, the parties may present all relevant admissible evidence either by stipulation or otherwise as agreed by the parties, without necessity for the production of evidence at an evidentiary hearing. If such agreement is reached, a jointly submitted schedule detailing the method and timetable for submission of the record, briefs and oral argument should be submitted to the presiding officer for approval as soon as practicable. If the parties cannot agree, any party may file and serve a motion for summary judgment pursuant to the rules governing such motions.

**875—1.95 (17A) Emergency adjudicative proceedings.**

**1.95(1)** Necessary emergency action. To the extent necessary to prevent or avoid immediate danger to the public health, safety, or welfare, and consistent with the Constitution and other provisions of law, the division may issue a

## LABOR SERVICES DIVISION[875](cont'd)

written order in compliance with 1998 Iowa Acts, chapter 1202, section 21, to suspend a license in whole or in part, order the cessation of any continuing activity, order affirmative action, or take other action within the jurisdiction of the division by emergency adjudicative order. Before issuing an emergency adjudicative order the division shall consider factors including, but not limited to, the following:

a. Whether there has been a sufficient factual investigation to ensure that the division is proceeding on the basis of reliable information;

b. Whether the specific circumstances which pose immediate danger to the public health, safety or welfare have been identified and determined to be continuing;

c. Whether the person required to comply with the emergency adjudicative order may continue to engage in other activities without posing immediate danger to the public health, safety or welfare;

d. Whether imposition of monitoring requirements or other interim safeguards would be sufficient to protect the public health, safety or welfare; and

e. Whether the specific action contemplated by the division is necessary to avoid the immediate danger.

**1.95(2) Issuance of order.**

a. An emergency adjudicative order shall contain findings of fact, conclusions of law, and policy reasons to justify the determination of an immediate danger in the division's decision to take immediate action.

b. The written emergency adjudicative order shall be immediately delivered to persons who are required to comply with the order by utilizing one or more of the following procedures:

(1) Personal delivery;

(2) Certified mail, return receipt requested, to the last address on file with the division;

(3) Certified mail to the last address on file with the division;

(4) First-class mail to the last address on file with the division; or

(5) Fax may be used as the sole method of delivery if the person required to comply with the order has filed a written request that division orders be sent by fax and has provided a fax number for that purpose.

c. To the degree practicable, the division shall select the procedure for providing written notice that best ensures prompt, reliable delivery.

**1.95(3) Oral notice.** Unless the written emergency adjudicative order is provided by personal delivery on the same day that the order issues, the division shall make reasonable immediate efforts to contact by telephone the persons who are required to comply with the order.

**1.95(4) Completion of proceedings.** After the issuance of an emergency adjudicative order, the division shall proceed as quickly as feasible to complete any proceedings that would be required if the matter did not involve an immediate danger.

Issuance of a written emergency adjudicative order shall include notification of the date on which division proceedings are scheduled for completion. After issuance of an emergency adjudicative order, continuance of further division proceedings to a later date will be granted only in compelling circumstances upon application in writing.

**875—1.96 to 1.98 Reserved.**

ITEM 5. Adopt a **new** Division VI as follows:

## DIVISION VI

## INTEREST, FEES AND CHARGES

**875—1.99(17A,91) Interest.** The commissioner may assess and collect interest on fees, penalties, and other amounts due the division. Interest shall accrue from the first of the month following the date when payment was due. If it becomes necessary to initiate legal actions to recover the money, the commissioner may recover court costs and attorney fees in addition to the interest. The interest rate shall be 10 percent per annum.

ITEM 6. Amend subrule 150.11(4) to read as follows:

**150.11(4) Hearing procedures.** Administrative hearing rules at 875—Chapter ~~300~~ *1* shall be applicable to the fact-finding hearings.

ITEM 7. Amend rule 875—150.15(91C) to read as follows:

**875—150.15(91C) Blanket bonds.** A blanket bond shall be in an amount not less than \$50,000. The commissioner may increase the bond after a hearing conducted pursuant to 875—Chapter ~~300~~ *1*.

ITEM 8. Amend rule 875—202.9(89) to read as follows:

**875—202.9(89) Hearing procedures.** The hearing procedures in ~~347—Chapter 300~~ *875—Chapter 1* shall govern.

ITEM 9. Rescind **875—Chapter 300.**

**ARC 8799A**

## LANDSCAPE ARCHITECTURAL EXAMINING BOARD[193D]

### Notice of Termination

Pursuant to the authority of Iowa Code section 544B.5, the Landscape Architectural Examining Board hereby terminates the rule making initiated by Notice of Intended Action published in the Iowa Administrative Bulletin on November 4, 1998, as **ARC 8424A**, amending Chapter 2, "Examinations and Registration," Chapter 4, "Disciplinary Action," and Chapter 5, "Public Records and Fair Information Practices," Iowa Administrative Code.

The Notice proposed to amend these chapters to comply with 1998 Iowa Acts, Senate File 2170, which required the board to deny the issuance or renewal of a registration, or suspend or revoke a registration when a certification of non-compliance was received that referred to a registrant who has defaulted on debt owed to or collected by the College Student Aid Commission.

The board is terminating the rule making commenced in **ARC 8424A** and will renote the proposed rules with amendments which implement changes to the Uniform Rules on Agency Procedure required by amendments to the Administrative Procedure Act in 1998 Iowa Acts, chapter 1202.

**ARC 8800A****LANDSCAPE ARCHITECTURAL  
EXAMINING BOARD[193D]****Notice of Intended Action**

Twenty-five interested persons, a governmental subdivision, an agency or association of 25 or more persons may demand an oral presentation hereon as provided in Iowa Code section 17A.4(1)"b."

Notice is also given to the public that the Administrative Rules Review Committee may, on its own motion or on written request by any individual or group, review this proposed action under section 17A.8(6) at a regular or special meeting where the public or interested persons may be heard.

Pursuant to the authority of Iowa Code section 544B.5, the Landscape Architectural Examining Board hereby gives Notice of Intended Action to amend Chapter 1, "Description of Organization"; rescind Chapter 4, "Disciplinary Action," and adopt a new Chapter 4 with the same title; amend Chapter 5, "Public Records and Fair Information Practices"; and rescind Chapter 7, "Waivers or Variances from Rules," and adopt a new Chapter 7, "Petition for Rule Making and for Declaratory Orders," Iowa Administrative Code.

The amendments to Chapter 1 add new definitions to implement changes to the Uniform Rules on Agency Procedure to comply with 1998 Iowa Acts, chapter 1202.

The amendment to Chapter 5 will enable the board to share information with the College Student Aid Commission regarding licensees who default on debt owed or collected by the Commission.

Chapters 4 and 7 are rescinded and new Chapters 4 and 7 are adopted which implement changes to the Iowa Administrative Procedure Act by 1998 Iowa Acts, chapter 1202.

Consideration will be given to all written suggestions or comments on the proposed amendments received on or before April 13, 1999. Comments should be addressed to Glenda Loving, Landscape Architectural Examining Board, 1918 S.E. Hulsizer, Ankeny, Iowa 50021, or faxed to (515) 281-7411. E-mail may be sent to glenda.loving@comm7.state.ia.us.

These amendments are intended to implement Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202, and Iowa Code chapters 272C and 544B.

The following amendments are proposed.

ITEM 1. Amend rule 193D—1.1(544B,17A), by adopting the following new definitions in alphabetical order:

"Issuance" means the date of mailing of a decision or order or the date of delivery if service is by other means unless another date is specified in the order.

"Proposed decision" means the presiding officer's recommended findings of fact, conclusions of law, decision, and order on a contested case in which the board did not preside.

ITEM 2. Rescind 193D—Chapter 4 and adopt the following new chapter in lieu thereof:

**CHAPTER 4  
DISCIPLINARY ACTION**

**193D—4.1(544B,272C,17A) Disciplinary action.** The landscape architectural examining board has authority in Iowa Code chapters 544B, 17A and 272C to impose discipline for violations of these chapters and the rules promulgated thereunder. The board shall consider the following acts or omissions to be grounds to revoke or suspend a certificate

of registration or to impose other licensee discipline to a registrant:

1. Fraud in procuring a certificate of registration.
2. Professional incompetency.
3. Knowingly making misleading, deceptive, untrue, or fraudulent representations in the practice of landscape architecture or engaging in unethical conduct or practice harmful or detrimental to the public. Proof of actual injury need not be established.
4. Habitual intoxication or addiction to the use of drugs.
5. Conviction of a felony related to the profession of the registrant that would affect the registrant's ability to practice professional landscape architecture. A copy of the record of conviction or plea of guilty shall be conclusive evidence.
6. Fraud in representation as to skill or ability.
7. Use of untruthful or improbable statements in advertisements.
8. Failure of a registrant to comply with Iowa Code chapter 272C or 544B and administrative rules implementing either chapter.
9. Failure of a registrant to complete continuing education requirements in accordance with 193D—Chapter 3.

**193D—4.2(544B,17A) Receipt of complaints.** The board shall receive and review all complaints which the board reasonably believes to indicate that a registrant may have committed an act that is cause for disciplinary action.

**4.2(1) Complaints.** Any person may file a complaint with the board charging that a registrant may have committed an act that is in violation of applicable law or rules. The complaint shall be written and signed by the complainant and accompanied with substantiating evidence indicating when, where, and how the registrant committed the violation. All complaints filed with the board shall be privileged and held confidential by all board members, peer review committee members and staff.

A person filing a complaint shall receive immunities in accordance with Iowa Code chapter 272C.

**4.2(2) Board instigated complaints.** Upon presentation of evidence by a board member, the board's staff, or other state agency, the board may determine that a complaint should be formulated to charge that a registrant may have committed an act that is in violation of applicable law or rules. A majority vote of the board approving a written motion stating the charges and containing evidence as to when, where, and how the violation might have occurred shall constitute a complaint to be processed by the complaint procedure.

**193D—4.3(544B,17A) Peer review committee.** At any point during the complaint procedure or the investigatory procedure and prior to determining whether probable cause exists that a violation has occurred, the board may appoint a peer review committee to assist the board in reaching its decisions by conducting an investigation(s) of the complaint.

**4.3(1) Makeup of the peer review committee.** The committee shall consist of one or more registered landscape architects who are selected for their knowledge and experience in the particular aspect of landscape architecture involved in the complaint. The following are ineligible for membership:

- a. Members of the board.
- b. Close relatives of the alleged violator(s) or complainant.
- c. Individuals employed by the same firm or governmental unit as the alleged violator or complainant.

**4.3(2) Authority.** The committee's investigation shall be limited to interviewing of complainants, the alleged violator,

## LANDSCAPE ARCHITECTURAL EXAMINING BOARD[193D](cont'd)

individuals with knowledge of the alleged violation, and individuals with knowledge of the alleged violator's reputation in the community.

The committee may not hire legal counsel, investigators, secretarial help or any other assistants without written authorization from the board.

**4.3(3) Compensation.** Committee members may receive per diem compensation equal to that received by board members for performing board duties. Committee members may be paid reasonable and necessary expenses that are incurred for travel, meals and lodging while performing committee duties within a budget limitation established by the board.

**193D—4.4(544B,272C) Investigation report.** Upon completion of the investigation, the investigator(s) shall prepare for the board's consideration a report containing the position or defense of the registrant to determine what further action is necessary. The board may:

1. Order the matter be further investigated.
2. Allow the registrant who is the subject of the complaint an opportunity to appear before the committee for an informal discussion regarding the circumstances of the alleged violation.
3. Determine there is no probable cause to believe a disciplinary violation has occurred and close the case.
4. Determine there is probable cause to believe that a disciplinary violation has occurred.

**193D—4.5(544B,272C) Informal discussion.** If the board considers it advisable, or if requested by the affected registrant, the board may grant the registrant an opportunity to appear before the board or a committee of the board for a voluntary informal discussion of the facts and circumstances of an alleged violation. The registrant may be represented by legal counsel at the informal discussion. The registrant is not required to attend the informal discussion. By electing to attend, the registrant waives the right to seek disqualification based upon personal investigation of a board member or staff from participating in making a contested case decision or acting as a presiding officer in a later contested case proceeding. Because an informal discussion constitutes a part of the board's investigation of a pending disciplinary case, the facts discussed at the informal discussion may be considered by the board in the event the matter proceeds to a contested case hearing and those facts are independently introduced into evidence. The board may seek a consent order at the time of the informal discussion. If the parties agree to a consent order, a statement of charges shall be filed simultaneously with the consent order.

**193D—4.6(544B,272C) Consent agreement.** It is unlawful for a person not qualified by registration to engage in or offer to engage in the practice of landscape architecture. The board in its discretion and in lieu of prosecuting a first offense of any of the offenses described in Iowa Code section 544B.18 may enter into a consent agreement with a violator. A representative of the board, designated by the chair, and a designated staff person or an assistant attorney general may agree to negotiate a consent agreement. The proposed consent agreement must be presented to the board for approval and shall be binding if signed by the board chair and the violator.

Failure to abide by the agreement is grounds for prosecution as a serious misdemeanor pursuant to Iowa Code section 544B.18.

**193D—4.7(544B,272C) Consent order.** The board may negotiate a settlement and enter into a consent order with a land-

scape architect who acknowledges a violation of the statute or rules and agrees to refrain from any further violation, pursuant to Iowa Code section 544B.16. A representative of the board, designated by the chair, and a designated staff person or an assistant attorney general may agree to negotiate a settlement. The proposed consent order must be presented to the board for approval and shall be binding if signed by the board chair and the landscape architect. Any board member who participates in negotiation of a consent order is not disqualified from participating in adjudication of the contested case. Consent to negotiation by the respondent constitutes waiver of notice and opportunity to be heard pursuant to Iowa Code section 17A.17 as amended by 1998 Iowa Acts, chapter 1202, section 19, during settlement negotiations. Thereafter, the prosecuting attorney is authorized to discuss informal settlement with the board president or designee.

**193D—4.8(544B,272C) Statement of charges.** The statement of charges shall set forth the acts or omissions with which the respondent is charged including the statute(s) and rule(s) which are alleged to have been violated and shall be in sufficient detail to enable the preparation of the respondent's defense.

**193D—4.9(17A) Time requirements.**

**4.9(1)** Time shall be computed as provided in Iowa Code subsection 4.1(34).

**4.9(2)** For good cause, the presiding officer may extend or shorten the time to take any action, except as precluded by statute. Except for good cause stated in the record, before extending or shortening the time to take any action, the presiding officer shall afford all parties an opportunity to be heard or to file written arguments.

**193D—4.10(17A) Requests for contested case proceeding.** Any person claiming an entitlement to a contested case proceeding shall file a written request for such a proceeding within the time specified by the particular rules or statutes governing the subject matter or, in the absence of such law, the time specified in the board action in question.

The request for a contested case proceeding should state the name and address of the requester; identify the specific board action which is disputed and, where the requester is represented by a lawyer, identify the provisions of law or precedent requiring or authorizing the holding of a contested case proceeding in the particular circumstances involved; and include a short and plain statement of the issues of material fact in dispute.

**193D—4.11(544B,272C) Notice of hearing.** The board's notice of hearing shall fix the time and place for hearing and shall contain those items specified in Iowa Code section 17A.12(2). The notice shall also contain the following:

1. A statement of the time, place, and nature of the hearing;
2. A statement of the legal authority and jurisdiction under which the hearing is to be held;
3. A reference to the particular sections of the statutes and rules involved;
4. A short and plain statement of the matters asserted. If the board or other party is unable to state the matters in detail at the time the notice is served, the initial notice may be limited to a statement of the issues involved. Thereafter, upon application, a more definite and detailed statement shall be furnished;
5. Identification of all parties including the name, address and telephone number of the person who will act as ad-

## LANDSCAPE ARCHITECTURAL EXAMINING BOARD[193D](cont'd)

vocate for the board or the state and identification of parties' counsel where known;

6. Reference to the procedural rules governing conduct of the contested case proceeding;

7. Reference to the procedural rules governing informal settlement;

8. Identification of the presiding officer, if known. If not known, a description of who will serve as presiding officer (i.e., the board, a panel of the board or administrative law judge from the department of inspections and appeals); and

9. A statement requiring the respondent to submit an answer of the type specified in rule 4.12(544B,272C) within 20 days after receipt of the notice of hearing.

**193D—4.12(544B,272C) Form of answer.** The answer shall contain the following information:

1. The name, address and telephone number of the respondent.

2. Specific statements regarding any or all allegations in the complaint which shall be in the form of admissions, denials, explanations, remarks or statements of mitigating circumstances.

3. Any additional facts or information the respondent deems relevant to the complaint and which may be of assistance in the ultimate determination of the case.

**193D—4.13(544B,272C) Legal representation.** Every statement of charges and notice of hearing prepared by the board shall be reviewed and approved by the office of the attorney general which shall be responsible for the legal representation of the public interest in all proceedings before the board. The assistant attorney general assigned to prosecute a contested case before the board shall not represent the board in that case but shall represent the public interest.

**193D—4.14(17A) Presiding officer.**

4.14(1) Any party who wishes to request that the presiding officer assigned to render a proposed decision be an administrative law judge employed by the department of inspections and appeals must file a written request within 20 days after service of a notice of hearing which identifies or describes the presiding officer as the board or a panel of the board.

4.14(2) The board may deny the request only upon a finding that one or more of the following apply:

a. Neither the board nor any officer of the board under whose authority the contested case is to take place is a named party to the proceeding or a real party in interest to that proceeding.

b. There is a compelling need to expedite issuance of a final decision in order to protect the public health, safety, or welfare.

c. The case involves a disciplinary hearing to be held by the board pursuant to Iowa Code section 272C.6.

d. The case involves significant policy issues of first impression that are inextricably intertwined with the factual issues presented.

e. The demeanor of the witnesses is likely to be dispositive in resolving the disputed factual issues.

f. Funds are unavailable to pay the costs of an administrative law judge and an interboard appeal.

g. The request was not timely filed.

h. The request is not consistent with a specified statute.

4.14(3) The board shall issue a written ruling specifying the grounds for its decision within 20 days after a request for an administrative law judge is filed.

4.14(4) Except as provided otherwise by another provision of law, all rulings by an administrative law judge acting

as presiding officer are subject to appeal to the board. A party must seek any available intra-agency appeal in order to exhaust adequate administrative remedies.

4.14(5) Unless otherwise provided by law, agency heads and members of multimembered agency heads, when reviewing a proposed decision upon intra-agency appeal, shall have the powers of and shall comply with the provisions of this chapter which apply to presiding officers.

**193D—4.15(17A) Waiver of procedures.** Unless otherwise precluded by law, the parties in a contested case proceeding may waive any provision of this chapter. However, the board in its discretion may refuse to give effect to such a waiver when it deems the waiver to be inconsistent with the public interest.

**193D—4.16(17A) Telephone proceedings.** The presiding officer may resolve preliminary procedural motions by telephone conference in which all parties have an opportunity to participate. Other telephone proceedings may be held with the consent of all parties. The presiding officer will determine the location of the parties and witnesses for telephone hearings. The convenience of the witnesses or parties, as well as the nature of the case, will be considered when location is chosen.

**193D—4.17(17A) Disqualification.**

4.17(1) A presiding officer or other person shall withdraw from participation in the making of any proposed or final decision in a contested case if that person:

a. Has a personal bias or prejudice concerning a party or a representative of a party;

b. Has personally investigated, prosecuted or advocated, in connection with that case, the specific controversy underlying that case, another pending factually related contested case, or a pending factually related controversy that may culminate in a contested case involving the same parties;

c. Is subject to the authority, direction or discretion of any person who has personally investigated, prosecuted or advocated in connection with that contested case, the specific controversy underlying that contested case, or a pending factually related contested case or controversy involving the same parties;

d. Has acted as counsel to any person who is a private party to that proceeding within the past two years;

e. Has a personal financial interest in the outcome of the case or any other significant personal interest that could be substantially affected by the outcome of the case;

f. Has a spouse or relative within the third degree of relationship that (1) is a party to the case, or an officer, director or trustee of a party; (2) is a lawyer in the case; (3) is known to have an interest that could be substantially affected by the outcome of the case; or (4) is likely to be a material witness in the case; or

g. Has any other legally sufficient cause to withdraw from participation in the decision making in that case.

4.17(2) The term "personally investigated" means taking affirmative steps to interview witnesses directly or to obtain documents or other information directly. The term "personally investigated" does not include general direction and supervision of assigned investigators, unsolicited receipt of information which is relayed to assigned investigators, review of another person's investigative work product in the course of determining whether there is probable cause to initiate a proceeding, or exposure to factual information while performing other board functions, including fact gathering for purposes other than investigation of the matter which culminates in a contested case. Factual information relevant to the

## LANDSCAPE ARCHITECTURAL EXAMINING BOARD[193D](cont'd)

merits of a contested case received by a person who later serves as presiding officer in that case shall be disclosed if required by Iowa Code section 17A.17 as amended by 1998 Iowa Acts, chapter 1202, section 19, and subrule 4.32(9).

4.17(3) In a situation where a presiding officer or other person knows of information which might reasonably be deemed to be a basis for disqualification and decides voluntary withdrawal is unnecessary, that person shall submit the relevant information for the record by affidavit and shall provide for the record a statement of the reasons for the determination that withdrawal is unnecessary.

4.17(4) If a party asserts disqualification on any appropriate ground, including those listed in subrule 4.17(1), the party shall file a motion supported by an affidavit pursuant to Iowa Code section 17A.17 as amended by 1998 Iowa Acts, chapter 1202, section 19(7). The motion must be filed as soon as practicable after the reason alleged in the motion becomes known to the party. If, during the course of the hearing, a party first becomes aware of evidence of bias or other grounds for disqualification, the party may move for disqualification but must establish the grounds by the introduction of evidence into the record.

If the presiding officer determines that disqualification is appropriate, the presiding officer or other person shall withdraw. If the presiding officer determines that withdrawal is not required, the presiding officer shall enter an order to that effect. A party asserting disqualification may seek an interlocutory appeal under rule 4.34(17A) and seek a stay under rule 4.37(17A).

#### 193D—4.18(17A) Consolidation—severance.

4.18(1) Consolidation. The presiding officer may consolidate any or all matters at issue in two or more contested case proceedings where (a) the matters at issue involve common parties or common questions of fact or law; (b) consolidation would expedite and simplify consideration of the issues involved; and (c) consolidation would not adversely affect the rights of any of the parties to those proceedings.

4.18(2) Severance. The presiding officer may, for good cause shown, order any contested case proceedings or portions thereof severed.

193D—4.19(17A) Amendments. Any notice of hearing or statement of charges may be amended before a responsive pleading has been filed. Amendments to pleadings after a responsive pleading has been filed and to an answer may be allowed with the consent of the other parties or in the discretion of the presiding officer who may impose terms or grant a continuance.

#### 193D—4.20(17A) Service and filing of pleadings and other papers.

4.20(1) When service required. Except where otherwise provided by law, every pleading, motion, document, or other paper filed in a contested case proceeding and every paper relating to discovery in such a proceeding shall be served upon each of the parties of record to the proceeding, including the person designated as advocate or prosecutor for the state or the board, simultaneously with their filing. Except for the original notice of hearing and an application for rehearing as provided in Iowa Code section 17A.16(2), the party filing a document is responsible for service on all parties.

4.20(2) Service—how made. Service upon a party represented by an attorney shall be made upon the attorney unless otherwise ordered. Service is made by delivery or by mailing a copy to the person's last-known address. Service by

mail is complete upon mailing, except where otherwise specifically provided by statute, rule, or order.

4.20(3) Filing—when required. After the notice of hearing, all pleadings, motions, documents or other papers in a contested case proceeding shall be filed with the board. All pleadings, motions, documents or other papers that are required to be served upon a party shall be filed simultaneously with the board.

4.20(4) Filing—when made. Except where otherwise provided by law, a document is deemed filed at the time it is delivered to the board, delivered to an established courier service for immediate delivery to that office, or mailed by first-class mail or state interoffice mail to that office, so long as there is proof of mailing.

4.20(5) Proof of mailing. Proof of mailing includes either a legible United States Postal Service postmark on the envelope, a certificate of service, a notarized affidavit, or a certification in substantially the following form:

I certify under penalty of perjury and pursuant to the laws of Iowa that, on (date of mailing), I mailed copies of (describe document) addressed to the Landscape Architectural Examining Board and to the names and addresses of the parties listed below by depositing the same in a United States post office mailbox with correct postage properly affixed or state interoffice mail.  
(Date) (Signature)

#### 193D—4.21(17A) Discovery.

4.21(1) Discovery procedures applicable in civil actions are applicable in contested cases. Unless lengthened or shortened by these rules or by order of the presiding officer, time periods for compliance with discovery shall be as provided in the Iowa Rules of Civil Procedure.

4.21(2) Any motion relating to discovery shall allege that the moving party has previously made a good-faith attempt to resolve the discovery issues involved with the opposing party. Motions in regard to discovery shall be ruled upon by the presiding officer. Opposing parties shall be afforded the opportunity to respond within ten days of the filing of the motion unless the time is shortened as provided in subrule 4.21(1). The presiding officer may rule on the basis of the written motion and any response, or may order argument on the motion.

4.21(3) Evidence obtained in discovery may be used in the contested case proceeding if that evidence would otherwise be admissible in that proceeding.

193D—4.22(17A) Subpoenas. In connection with the investigation of a complaint, the board is authorized by law to subpoena books, papers, records, and any other real evidence, whether or not privileged or confidential under law, to help it determine whether it should institute a contested case proceeding (disciplinary hearing). After service of the notice of hearing under rule 4.11(544B,272C), the following procedures are available to the parties in order to obtain relevant and material evidence:

4.22(1) Board subpoenas for books, papers, records, and other real evidence will be issued to a party upon request. Subpoenas for witnesses may also be obtained. The executive secretary shall issue all subpoenas for both parties upon request. The request, which may be verbal or written, must specify the documents sought to be obtained and the names of the witnesses whose testimony is sought.

4.22(2) The presiding officer may quash or modify a subpoena for any lawful reason upon motion in accordance with the Iowa Rules of Civil Procedure. A motion to quash or modify a subpoena shall be set for argument promptly.

## LANDSCAPE ARCHITECTURAL EXAMINING BOARD[193D](cont'd)

4.22(3) In the event of a refusal to obey a subpoena, either party or the board may petition the district court for its enforcement. Upon proper showing, the district court shall order the person to obey the subpoena and, if the person fails to obey the order of the court, the person may be found guilty of contempt of court.

**193D—4.23(17A) Motions.**

4.23(1) No technical form for motions is required. However, prehearing motions must be in writing, state the grounds for relief, and state the relief sought.

4.23(2) Any party may file a written response to a motion within ten days after the motion is served, unless the time period is extended or shortened by rules of the board or the presiding officer. The presiding officer may consider a failure to respond within the required time period in ruling on a motion.

4.23(3) The presiding officer may schedule oral argument on any motion.

4.23(4) Motions pertaining to the hearing, except motions for summary judgment, must be filed and served at least five days prior to the date of hearing unless there is good cause for permitting later action or the time for such action is lengthened or shortened by rule of the board or an order of the presiding officer.

4.23(5) Motions for summary judgment shall comply with the requirements of Iowa Rule of Civil Procedure 237 and shall be subject to disposition according to the requirements of that rule to the extent such requirements are not inconsistent with the provisions of this rule or any other provision of law governing the procedure in contested cases.

Motions for summary judgment must be filed and served at least 20 days prior to the scheduled hearing date, or other time period determined by the presiding officer. Any party resisting the motion shall file and serve a resistance within 10 days, unless otherwise ordered by the presiding officer, from the date a copy of the motion was served. The time fixed for hearing or nonoral submission shall be not less than 15 days after the filing of the motion, unless a shorter time is ordered by the presiding officer. A summary judgment order rendered on all issues in a contested case is subject to rehearing pursuant to rule 4.36(17A) and appeal pursuant to rule 4.35(17A).

**193D—4.24(17A) Prehearing conference.**

4.24(1) Any party may request a prehearing conference. A written request for prehearing conference or an order for prehearing conference on the presiding officer's own motion shall be filed not less than seven days prior to the hearing date. A prehearing conference shall be scheduled not less than three business days prior to the hearing date.

Written notice of the prehearing conference shall be given by the board to all parties. For good cause the presiding officer may permit variances from this rule.

4.24(2) Each party shall bring to the prehearing conference:

a. A final list of the witnesses who the party anticipates will testify at hearing. Witnesses not listed may be excluded from testifying unless there was good cause for the failure to include their names; and

b. A final list of exhibits which the party anticipates will be introduced at hearing. Exhibits other than rebuttal exhibits that are not listed may be excluded from admission into evidence unless there was good cause for the failure to include them.

c. Witness or exhibit lists may be amended subsequent to the prehearing conference within the time limits estab-

lished by the presiding officer at the prehearing conference. Any such amendments must be served on all parties.

4.24(3) In addition to the requirements of subrule 4.24(2), the parties at a prehearing conference may:

- a. Enter into stipulations of law or fact;
- b. Enter into stipulations on the admissibility of exhibits;
- c. Identify matters which the parties intend to request be officially noticed;
- d. Enter into stipulations for waiver of any provision of law; and
- e. Consider any additional matters which will expedite the hearing.

4.24(4) Prehearing conferences shall be conducted by telephone unless otherwise ordered. Parties shall exchange and receive witness and exhibit lists in advance of a telephone prehearing conference.

**193D—4.25(17A) Continuances.** Unless otherwise provided, applications for continuances shall be made to the presiding officer.

4.25(1) A written application for a continuance shall:

- a. Be made at the earliest possible time and no less than seven days before the hearing except in case of unanticipated emergencies;
- b. State the specific reasons for the request; and
- c. Be signed by the requesting party or the party's representative.

An oral application for a continuance may be made if the presiding officer waives the requirement for a written motion. However, a party making such an oral application for a continuance must confirm that request by written application within five days after the oral request unless that requirement is waived by the presiding officer. No application for continuance shall be made or granted without notice to all parties except in an emergency where notice is not feasible. The board may waive notice of such requests for a particular case or an entire class of cases.

4.25(2) In determining whether to grant a continuance, the presiding officer may consider:

- a. Prior continuances;
- b. The interests of all parties;
- c. The likelihood of informal settlement;
- d. The existence of an emergency;
- e. Any objection;
- f. Any applicable time requirements;
- g. The existence of a conflict in the schedules of counsel, parties, or witnesses;
- h. The timeliness of the request; and
- i. Other relevant factors.

The presiding officer may require documentation of any grounds for continuance.

**193D—4.26(17A) Withdrawals.** A party requesting a contested case proceeding may withdraw that request prior to the hearing only in accordance with board rules. Unless otherwise provided, a withdrawal shall be with prejudice.

**193D—4.27(17A) Intervention.**

4.27(1) Motion. A motion for leave to intervene in a contested case proceeding shall state the grounds for the proposed intervention, the position and interest of the proposed intervenor, and the possible impact of intervention on the proceeding. A proposed answer or petition in intervention shall be attached to the motion. Any party may file a response within 14 days of service of the motion to intervene unless the time period is extended or shortened by the presiding officer.

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**4.27(2)** When filed. Motion for leave to intervene shall be filed as early in the proceeding as possible to avoid adverse impact on existing parties or the conduct of the proceeding. Unless otherwise ordered, a motion for leave to intervene shall be filed before the prehearing conference, if any, or at least 20 days before the date scheduled for hearing. Any later motion must contain a statement of good cause for the failure to file in a timely manner. Unless inequitable or unjust, an intervenor shall be bound by any agreement, arrangement, or other matter previously raised in the case. Requests by untimely intervenors for continuances which would delay the proceeding will ordinarily be denied.

**4.27(3)** Grounds for intervention. The movant shall demonstrate that (a) intervention would not unduly prolong the proceedings or otherwise prejudice the rights of existing parties; (b) the movant is likely to be aggrieved or adversely affected by a final order in the proceeding; and (c) the interests of the movant are not adequately represented by existing parties.

**4.27(4)** Effect of intervention. If appropriate, the presiding officer may order consolidation of the petitions and briefs of different parties whose interests are aligned with each other and limit the number of representatives allowed to participate actively in the proceedings. A person granted leave to intervene is a party to the proceeding. The order granting intervention may restrict the issues that may be raised by the intervenor or otherwise condition the intervenor's participation in the proceeding.

**193D—4.28(544B,272C) Hearings.** A hearing may be conducted before a majority of the board members. An administrative law judge may act as presiding officer to conduct the hearing for the board or a panel of the board. The presiding officer shall be in control of the proceedings and shall have the authority to administer oaths, to admit or exclude testimony or other evidence and shall rule on all motions and objections.

**4.28(1)** Examination of witnesses by the board. The presiding officer and other board members have the right to conduct direct examination of the witnesses at any stage of that witness's testimony.

**4.28(2)** Public hearing. The hearing shall be open to the public unless the registrant or registrant's attorney requests in writing that the hearing be closed to the public.

**4.28(3)** Record of proceedings. Oral proceedings shall be recorded either by mechanical or electrical means or by certified shorthand reporters. Oral proceedings or any part thereof shall be transcribed at the request of any party with the expense of the transcription charged to the requesting party. The recording or stenographic notes of oral proceedings or the transcription shall be filed with and maintained by the board for at least five years from the date of decision.

**4.28(4)** Order of proceedings. Before testimony is presented, the record shall show the identity of any board members present, identity of the administrative law judge, identity of the primary parties and their representatives, and the fact that all testimony is being recorded. Hearings before the board shall generally be conducted in the following order, subject to modification at the discretion of the board.

a. The presiding officer or designated person may read a summary of the charges and answers thereto and other responsive pleadings filed by the respondent prior to the hearing.

b. The assistant attorney general representing the state's interest before the board shall make a brief opening statement which will include a summary of charges and the witnesses and documents to support such charges.

c. The respondent(s) shall be offered the opportunity to make an opening statement, including the names of any witnesses the respondent(s) desires to call in defense. A respondent may elect to make the opening statement just prior to the presentation of evidence by the respondent(s).

d. The presentation of evidence on behalf of the state.

e. A summary, at the close of the evidence on behalf of the state.

f. The presentation of evidence on behalf of the respondent(s).

g. Rebuttal evidence on behalf of the state, if any.

h. Rebuttal evidence on behalf of the respondent(s), if any.

i. Closing arguments first on behalf of the state, then on behalf of the respondent(s), and then on behalf of the state, if any.

**4.28(5)** Immunity. The presiding officer shall have authority to grant immunity from disciplinary action to a witness, as provided by Iowa Code section 272C.6(3), but only upon the unanimous vote of all members of the board hearing the case. The official record of the hearing shall include the reasons for granting the immunity.

**4.28(6)** Evidence. Admissibility of evidence at the hearing shall be governed by Iowa Code section 17A.14. Copies of documents offered as evidence at the hearing shall be provided to opposing parties. Copies may also be furnished to members of the board.

**4.28(7)** Final decision. When four or more members of the board preside over the reception of evidence at the hearing, the decision is a final decision. The final decision of the board shall be filed with the executive secretary. A copy of the decision and order shall immediately be sent by certified mail, return receipt requested, to the registrant's last-known post office address or may be served as in the manner of original notices upon the registrant.

**193D—4.29(544B,272C) Dispensation.** The board shall make findings of fact, conclusions of law and may take one or more of the following actions:

1. Dismiss the charges.

2. Revoke the landscape architect's registration.

3. Suspend the registrant's registration as authorized by law.

4. Impose civil penalties, the amount which shall be set at the discretion of the board but which shall not exceed \$1000. Civil penalties may be imposed for any of the disciplinary violations specified in Iowa Code section 544B.15 and Iowa Code sections 272C.9(2) and 272C.9(3) and these rules, or for any repeated offenses.

5. Impose a period of probation, either with or without conditions.

6. Require reexamination, using one or more parts of the examination given to landscape architectural registrant candidates.

7. Require additional professional education, reeducation, or continuing education.

8. Issue a citation and a warning.

9. Issue a consent order.

10. Voluntary surrender of registration is considered as disciplinary action.

**193D—4.30(17A) Evidence.**

**4.30(1)** The presiding officer shall rule on admissibility of evidence and may, where appropriate, take official notice of facts in accordance with all applicable requirements of law.

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**4.30(2)** Stipulation of facts is encouraged. The presiding officer may make a decision based on stipulated facts.

**4.30(3)** Evidence in the proceeding shall be confined to the issues as to which the parties received notice prior to the hearing unless the parties waive their right to such notice or the presiding officer determines that good cause justifies expansion of the issues. If the presiding officer decides to admit evidence on issues outside the scope of the notice over the objection of a party who did not have actual notice of those issues, that party, upon timely request, shall receive a continuance sufficient to amend pleadings and to prepare on the additional issue.

**4.30(4)** The party seeking admission of an exhibit must provide opposing parties with an opportunity to examine the exhibit prior to the ruling on its admissibility. Copies of documents shall be provided to opposing parties. Copies may also be furnished to members of the board.

All exhibits admitted into evidence shall be appropriately marked and be made part of the record.

**4.30(5)** Any party may object to specific evidence or may request limits on the scope of any examination or cross-examination. Such an objection shall be accompanied by a brief statement of the grounds upon which it is based. The objection, the ruling on the objection, and the reasons for the ruling shall be noted in the record. The presiding officer may rule on the objection at the time it is made or may reserve a ruling until the written decision.

**4.30(6)** Whenever evidence is ruled inadmissible, the party offering that evidence may submit an offer of proof on the record. The party making the offer of proof for excluded oral testimony shall briefly summarize the testimony or, with permission of the presiding officer, present the testimony. If the excluded evidence consists of a document or exhibit, it shall be marked as part of an offer of proof and inserted in the record.

#### 193D—4.31(17A) Default.

**4.31(1)** If a party fails to appear or participate in a contested case proceeding after proper service of notice, the presiding officer may, if no adjournment is granted, enter a default decision or proceed with the hearing and render a decision in the absence of the party.

**4.31(2)** Where appropriate and not contrary to law, any party may move for default against a party who has requested the contested case proceeding and has failed to file a required pleading or has failed to appear after proper service.

**4.31(3)** Default decisions or decisions rendered on the merits after a party has failed to appear or participate in a contested case proceeding become final board action unless, within 15 days after the date of notification or mailing of the decision, a motion to vacate is filed and served on all parties or an appeal of a decision on the merits is timely initiated within the time provided by rule 4.35(17A). A motion to vacate must state all facts relied upon by the moving party which establish that good cause existed for that party's failure to appear or participate at the contested case proceeding. Each fact so stated must be substantiated by at least one sworn affidavit of a person with personal knowledge of each such fact, which affidavit(s) must be attached to the motion.

**4.31(4)** The time for further appeal of a decision for which a timely motion to vacate has been filed is stayed pending a decision on the motion to vacate.

**4.31(5)** Properly substantiated and timely filed motions to vacate shall be granted only for good cause shown. The burden of proof as to good cause is on the moving party. Adverse parties shall have ten days to respond to a motion to vacate. Adverse parties shall be allowed to conduct discovery

as to the issue of good cause and to present evidence on the issue prior to a decision on the motion, if a request to do so is included in that party's response.

**4.31(6)** "Good cause" for purposes of this rule shall have the same meaning as "good cause" for setting aside a default judgment under Iowa Rule of Civil Procedure 236.

**4.31(7)** A decision denying a motion to vacate is subject to further appeal within the time limit allowed for further appeal of a decision on the merits in the contested case proceeding. A decision granting a motion to vacate is subject to interlocutory appeal by the adverse party pursuant to rule 4.34(17A).

**4.31(8)** If a motion to vacate is granted and no timely interlocutory appeal has been taken, the presiding officer shall issue another notice of hearing and the contested case shall proceed accordingly.

**4.31(9)** A default decision may award any relief consistent with the request for relief made in the petition and embraced in its issues.

**4.31(10)** A default decision may provide either that the default decision is to be stayed pending a timely motion to vacate or that the default decision is to take effect immediately, subject to a request for stay under rule 4.37(17A).

#### 193D—4.32(17A) Ex parte communication.

**4.32(1)** Prohibited communications. Unless required for the disposition of ex parte matters specifically authorized by statute, following issuance of the notice of hearing, there shall be no communication, directly or indirectly, between the presiding officer and any party or representative of any party or any other person with a direct or indirect interest in such case in connection with any issue of fact or law in the case except upon notice and opportunity for all parties to participate. This does not prohibit persons jointly assigned such tasks from communicating with each other. Nothing in this provision is intended to preclude the presiding officer from communicating with members of the board or seeking the advice or help of persons other than those with a personal interest in, or those engaged in personally investigating as defined in subrule 4.17(2), prosecuting, or advocating in, either the case under consideration or a pending factually related case involving the same parties as long as those persons do not directly or indirectly communicate to the presiding officer any ex parte communications they have received of a type that the presiding officer would be prohibited from receiving or that furnish, augment, diminish, or modify the evidence in the record.

**4.32(2)** Prohibitions on ex parte communications commence with the issuance of the notice of hearing in a contested case and continue for as long as the case is pending.

**4.32(3)** Written, oral or other forms of communication are ex parte if made without notice and opportunity for all parties to participate.

**4.32(4)** To avoid prohibited ex parte communications, notice must be given in a manner reasonably calculated to give all parties a fair opportunity to participate. Notice of written communications shall be provided in compliance with rule 4.20(17A) and may be supplemented by telephone, facsimile, electronic mail or other means of notification. Where permitted, oral communications may be initiated through conference telephone call including all parties or their representatives.

**4.32(5)** Persons who jointly act as presiding officers in a pending contested case may communicate with each other without notice or opportunity for parties to participate.

**4.32(6)** The executive secretary or other persons may be present in deliberations or otherwise advise the presiding of-

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ficer without notice or opportunity for parties to participate as long as they are not disqualified from participating in the making of a proposed or final decision under any provision of law and they comply with subrule 4.32(1).

**4.32(7) Communications with the presiding officer involving uncontested scheduling or procedural matters do not require notice or opportunity for parties to participate.** Parties should notify other parties prior to initiating such contact with the presiding officer when feasible, and shall notify other parties when seeking to continue hearings or other deadlines pursuant to rule 4.25(17A).

**4.32(8) Disclosure of prohibited communications.** A presiding officer who receives a prohibited ex parte communication during the pendency of a contested case must initially determine if the effect of the communication is so prejudicial that the presiding officer should be disqualified. If the presiding officer determines that disqualification is warranted, a copy of any prohibited written communication, all written responses to the communication, a written summary stating the substance of any prohibited oral or other communication not available in written form for disclosure, all responses made, and the identity of each person from whom the presiding officer received a prohibited ex parte communication shall be submitted for inclusion in the record under seal by protective order. If the presiding officer determines that disqualification is not warranted, such documents shall be submitted for inclusion in the record and served on all parties. Any party desiring to rebut the prohibited communication must be allowed the opportunity to do so upon written request filed within ten days after notice of the communication.

**4.32(9) Promptly after being assigned to serve as presiding officer at any stage in a contested case proceeding, a presiding officer shall disclose to all parties material factual information received through ex parte communication prior to such assignment unless the factual information has already been or shortly will be disclosed pursuant to Iowa Code section 17A.13(2) or through discovery.** Factual information contained in an investigative report or similar document need not be separately disclosed by the presiding officer as long as such documents have been or will shortly be provided to the parties.

**4.32(10) The presiding officer may render a proposed or final decision imposing appropriate sanctions for violations of this rule including default, a decision against the offending party, censure, or suspension or revocation of the privilege to practice before the board.** Violation of ex parte communication prohibitions by board personnel shall be reported to the division administrator for possible sanctions including censure, suspension, dismissal, or other disciplinary action.

**193D—4.33(17A) Recording costs.** Upon request, the board shall provide a copy of the whole record or any portion of the record at cost. The cost of preparing a copy of the record or of transcribing the hearing record shall be paid by the requesting party.

Parties who request that a hearing be recorded by certified shorthand reporters rather than by electronic means shall bear the cost of that recordation, unless otherwise provided by law.

**193D—4.34(17A) Interlocutory appeals.** Upon written request of a party or on its own motion, the board may review an interlocutory order of the presiding officer. In determining whether to do so, the board shall weigh the extent to which its granting the interlocutory appeal would expedite final reso-

lution of the case and the extent to which review of that interlocutory order by the board at the time it reviews the proposed decision of the presiding officer would provide an adequate remedy. Any request for interlocutory review must be filed within 14 days of issuance of the challenged order, but no later than the date for compliance with the order or the date of hearing, whichever is earlier.

**193D—4.35(17A) Appeals and review.**

**4.35(1) Appeal by party.** Any adversely affected party may appeal a proposed decision to the board within 30 days after issuance of the proposed decision.

**4.35(2) Review.** The board may initiate review of a proposed decision on its motion at any time within 30 days following the issuance of such a decision.

**4.35(3) Notice of appeal.** An appeal of a proposed decision is initiated by filing a timely notice of appeal with the board. The notice of appeal must be signed by the appealing party or a representative of that party and contain a certificate of service. The notice shall specify:

- a. The parties initiating the appeal;
- b. The proposed decision or order which is being appealed;
- c. The specific findings or conclusions to which exception is taken and any other exceptions to the decision or order;
- d. The relief sought;
- e. The grounds for relief.

**4.35(4) Requests to present additional evidence.** A party may appeal the taking of additional evidence only by establishing that the evidence is material, that good cause existed for the failure to present the evidence at the hearing, and that the party has not waived the right to present the evidence. A written request to present additional evidence must be filed with the notice of appeal or, by a nonappealing party, within 14 days of service of the notice of appeal. The board may remand a case to the presiding officer for further hearing or may itself preside at the taking of additional evidence.

**4.35(5) Scheduling.** The board shall issue a schedule for consideration of the appeal.

**4.35(6) Briefs and arguments.** Unless otherwise ordered, within 20 days of the notice of appeal or order for review, each appealing party may file exceptions and briefs. Within 20 days thereafter, any party may file a responsive brief. Briefs shall cite any applicable legal authority and specify relevant portions of the record in that proceeding. Written requests to present oral argument shall be filed with the briefs. The board may resolve the appeal on the briefs or provide an opportunity for oral argument. The board may shorten or extend the briefing period as appropriate.

**193D—4.36(17A) Applications for rehearing.**

**4.36(1) By whom filed.** Any party to a contested case proceeding may file an application for rehearing from a final order.

**4.36(2) Content of application.** The application for rehearing shall state on whose behalf it is filed, the specific grounds for rehearing, and the relief sought. In addition, the application shall state whether the applicant desires reconsideration of all or part of the board decision on the existing record and whether, on the basis of the grounds enumerated in subrule 4.35(4), the applicant requests an opportunity to submit additional evidence.

**4.36(3) Time of filing.** The application shall be filed with the board within 20 days after issuance of the final decision.

**4.36(4) Notice to other parties.** A copy of the application shall be timely mailed by the applicant to all parties of record

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not joining therein. If the application does not contain a certificate of service, the board shall serve copies of the certificate of service on all parties.

**4.36(5) Disposition.** Any application for a rehearing shall be deemed denied unless the board grants the application within 20 days after its filing.

**193D—4.37(17A) Stays of board actions.****4.37(1) When available.**

a. Any party to a contested case proceeding may petition the board for a stay of an order issued in that proceeding or for other temporary remedies, pending review by the board. The petition shall be filed with the notice of appeal and shall state the reasons justifying a stay or other temporary remedy. The board may rule on the stay or authorize the presiding officer to do so.

b. Any party to a contested case proceeding may petition the board for a stay or other temporary remedies, pending judicial review of all or part of that proceeding. The petition shall state the reasons justifying a stay or other temporary remedy.

**4.37(2) When granted.** In determining whether to grant a stay, the presiding officer or board shall consider the factors listed in 1998 Iowa Acts, chapter 1202, section 23(5c).

**4.37(3) Vacation.** A stay may be vacated by the issuing authority upon application of the board or any other party.

**193D—4.38(17A) No factual dispute contested cases.** If the parties agree that no dispute of material fact exists as to a matter that would be a contested case if such a dispute of fact existed, the parties may present all relevant admissible evidence either by stipulation or otherwise as agreed by the parties, without necessity for the production of evidence at an evidentiary hearing. If such agreement is reached, a jointly submitted schedule detailing the method and timetable for the submission of the record, briefs and oral argument should be submitted to the presiding officer for approval as soon as practicable. If the parties cannot agree, any party may file and serve a motion for summary judgment pursuant to the rules governing such motions.

**193D—4.39(17A) Emergency adjudicative proceedings.**

**4.39(1) Necessary emergency action.** To the extent necessary to prevent or avoid immediate danger to the public health, safety, or welfare, and consistent with the United States Constitution and Iowa Constitution and other provisions of law, the board may issue a written order in compliance with 1998 Iowa Acts, chapter 1202, section 21, to suspend a license in whole or in part, order the cessation of any continuing activity, order affirmative action, or take other action within the jurisdiction of the board by emergency adjudicative order. Before issuing an emergency adjudicative order the board shall consider factors including, but not limited to, the following:

a. Whether there has been a sufficient factual investigation to ensure that the board is proceeding on the basis of reliable information;

b. Whether the specific circumstances which pose immediate danger to the public health, safety or welfare have been identified and determined to be continuing;

c. Whether the person required to comply with the emergency adjudicative order may continue to engage in other activities without posing immediate danger to the public health, safety or welfare;

d. Whether imposition of monitoring requirements or other interim safeguards would be sufficient to protect the public health, safety or welfare; and

e. Whether the specific action contemplated by the board is necessary to avoid the immediate danger.

**4.39(2) Issuance of order.**

a. An emergency adjudicative order shall contain findings of fact, conclusions of law, and policy reasons to justify the determination of an immediate danger in the board's decision to take immediate action.

b. The written emergency adjudicative order shall be immediately delivered to persons who are required to comply with the order by utilizing one or more of the following procedures:

(1) Personal delivery;

(2) Certified mail, return receipt requested, to the last address on file with the board;

(3) Certified mail to the last address on file with the board;

(4) First-class mail to the last address on file with the board; or

(5) Fax. Fax may be used as the sole method of delivery if the person required to comply with the order has filed a written request that board orders be sent by fax and has provided a fax number for that purpose.

c. To the degree practicable, the board shall select the procedure for providing written notice that best ensures prompt, reliable delivery.

**4.39(3) Oral notice.** Unless the written emergency adjudicative order is provided by personal delivery on the same day that the order issues, the board shall make reasonable immediate efforts to contact by telephone the persons who are required to comply with the order.

**4.39(4) Completion of proceedings.** After the issuance of an emergency adjudicative order, the board shall proceed as quickly as feasible to complete any proceedings that would be required if the matter did not involve an immediate danger.

Issuance of a written emergency adjudicative order shall include notification of the date on which board proceedings are scheduled for completion. After issuance of an emergency adjudicative order, continuance of further board proceedings to a later date will be granted only in compelling circumstances upon application in writing.

**193D—4.40(544B,272C) Judicial review.** Judicial review of the board's decision may be sought in accordance with the terms of Iowa Code chapter 17A.

**193D—4.41(544B,272C) Reinstatement.** Any person whose registration has been revoked or suspended by the board may apply to the board for reinstatement in accordance with the terms of the order of revocation or suspension.

**4.41(1)** If the order of revocation or suspension did not establish terms upon which reinstatement might occur, or if the registration was voluntarily surrendered, an initial application for reinstatement may not be made until one year has elapsed from the date of the order or the date of voluntary surrender.

**4.41(2)** All proceedings for reinstatement shall be initiated by the respondent who shall file with the board an application for reinstatement of the respondent's registration. Such application shall be docketed in the original case in which the registration was revoked, suspended, or relinquished. All proceedings upon the petition for reinstatement, including the matters preliminary and ancillary thereto, shall be subject to the same rules of procedure as other cases before the board.

**4.41(3)** An application for reinstatement shall allege facts which, if established, will be sufficient to enable the board to

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determine that the basis of revocation or suspension of the respondent's registration no longer exists and that it will be in the public interest for the registration to be reinstated. The burden of proof to establish such facts shall be on the respondent.

4.41(4) An order of reinstatement shall be based upon a decision which incorporates findings of fact and conclusions of law and must be based upon the affirmative vote of not fewer than five members of the board. This order will be published as provided for in rule 4.42(544B,272C).

193D—4.42(544B,272C) **Publication of decisions.** Final decisions of the board relating to disciplinary actions, including consent agreements and consent orders, are public documents, are available to the public, shall be published in the professional licensing division's newsletter and may be transmitted to the appropriate professional association(s), other states, and news media.

193D—4.43(544B,272C) **Hearing on license denial.** If the board, upon receipt of a complete and proper application for initial registration or reciprocal registration, accompanied by the proper fee, shall deny registration to the applicant, the executive secretary shall send written notice to the applicant by regular first-class mail identifying the basis for denial.

4.43(1) An applicant denied registration who desires to contest the denial must request a hearing before the board within 30 days of the date the notice of denial is mailed. A request for a hearing must be in writing and is deemed made on the date of the United States Postal Service postmark or the date of personal service. The request for hearing shall specify the grounds under which the applicant contends that the board erred in denying registration. If a request for hearing is timely made, the board shall issue notice of hearing and conduct a contested case hearing.

4.43(2) Hearings on registration denial shall be open to the public. The burden of presenting evidence and information or documents to support the applicant's position shall be the responsibility of the applicant.

4.43(3) The board, after a hearing on registration denial, may grant or deny the application for registration. If denied, the board shall state the reasons for denial of the license and may state conditions under which the application for registration could be granted, if applicable.

4.43(4) The notice of registration denial, request for hearing, notice of hearing, and order are open records available for inspection and copying in accordance with Iowa Code chapter 22. Copies may be provided to the media, Council of Landscape Architecture Registration Boards (CLARB), and other persons or entities.

4.43(5) Judicial review of a final order denying registration may be sought in accordance with the provisions of Iowa Code section 17A.19 as amended by 1998 Iowa Acts, chapter 1202, which are applicable to judicial review of any agency's final decision in a contested case.

193D—4.44(544B,272C) **Recovery of hearing fees and expenses.** The board may assess the landscape architect certain fees and expenses relating to a disciplinary hearing, only if the board finds that the landscape architect did violate Iowa Code chapter 544B and rules of the landscape architectural examining board.

4.44(1) The board may assess an amount up to the following costs under this rule:

a. For conducting a disciplinary hearing, an amount not to exceed \$75.

b. All applicable costs involved in the transcript including, but not limited to, the services of the court reporter at the

hearing, transcription, duplication, and postage or delivery costs.

c. All normally accepted witness expenses and fees for a hearing or the taking of depositions. This shall include, but not be limited to, the cost of an expert witness and the cost involved in telephone testimony.

d. All normally applicable costs involved in depositions including, but not limited to, the services of the court reporter recording the deposition, transcription, duplication, and postage or delivery costs.

e. The board, at its discretion, may assess an appropriate amount up to but not exceeding the \$75 fee established by this subrule and the actual acceptable costs, fees, and expenses involved.

4.44(2) Fees, costs, and expenses assessed pursuant to this rule shall be calculated and may be entered into the disciplinary order specifying the amount to be reimbursed and the time period in which the amount assessed must be paid by the landscape architect.

a. When it is impractical or not possible to include the assessment and time period in the disciplinary order in a timely manner, or if the expenditures occur after the disciplinary order, the board, by a majority vote of the members present, may assess the amount to be reimbursed and the time period in which payment is to be made by the landscape architect.

b. If the assessment and the time period are not included in the disciplinary order, the board shall have to the end of the sixth month after the date the state of Iowa paid the expenditures to assess the landscape architect for such expenditure.

4.44(3) Fees, costs, and expenses assessed by the board pursuant to this rule shall be allocated to the expenditure category in which the disciplinary procedure of hearing was incurred. The fees, costs, and expenses shall be considered repayment receipts as defined in Iowa Code section 8.2.

4.44(4) The failure to comply with payment of the assessed costs, fees, and expenses within the time specified by the board shall be considered prima facie evidence of a violation of Iowa Code chapter 544B. However, no action may be taken against the landscape architect without a hearing as provided in this chapter.

193D—4.45(272C) **Impaired licensee review committee.** Pursuant to the authority of Iowa Code section 272C.3(1)"k," the landscape architectural examining board establishes the impaired licensee review committee.

4.45(1) **Definitions.** The following definitions are applicable wherever such terminology is used in the rules regarding the impaired licensee review committee.

"Committee" means the impaired licensee review committee.

"Contract" means the written document establishing the terms for participation in the impaired licensee program prepared by the committee.

"Impairment" means an inability to practice with reasonable safety and skill as a result of alcohol or drug abuse, dependency, or addiction, or any neuropsychological or physical disorder or disability.

"Licensee" means a person registered under Iowa Code chapter 544B.

"Self-report" means the licensee's providing written or oral notification to the board that the licensee has been or may be diagnosed as having an impairment prior to the board's receiving a complaint or report alleging the same from a second party.

4.45(2) **Purpose.** The impaired licensee review committee evaluates, assists, monitors, and, as necessary, makes re-

## LANDSCAPE ARCHITECTURAL EXAMINING BOARD[193D](cont'd)

ports to the board on the recovery or rehabilitation of licensees who self-report impairments.

**4.45(3) Composition of the committee.** The chairperson of the board shall appoint the members of the committee. The membership of the committee includes, but is not limited to:

- a. One licensee, registered under Iowa Code chapter 544B;
- b. One public member of the landscape architectural examining board;
- c. One licensed professional with expertise in substance abuse/addiction treatment programs.

**4.45(4) Eligibility.** To be eligible for participation in the impaired licensee recovery program, a licensee must meet all of the following criteria:

- a. The licensee must self-report an impairment or suspected impairment directly to the office of the board;
- b. The licensee must not have engaged in the unlawful diversion or distribution of controlled substances or illegal substances;
- c. At the time of the self-report, the licensee must not already be under board order for an impairment or any other violation of the laws and rules governing the practice of the profession;
- d. The licensee has not caused harm or injury to a client;
- e. There is currently no board investigation of the licensee that the committee determines concerns serious matters related to the ability to practice with reasonable safety and skill or in accordance with the accepted standards of care;
- f. The licensee has not been subject to a civil or criminal sanction or ordered to make reparations or remuneration by a government or regulatory authority of the United States, this or any other state or territory or foreign nation for actions that the committee determines to be serious infractions of the laws, administrative rules, or professional ethics related to the practice of landscape architecture.
- g. The licensee has provided truthful information and fully cooperated with the board or committee.

**4.45(5) Meetings.** The committee shall meet as necessary in order to review licensee compliance, develop consent agreements for new referrals, and determine eligibility for continued monitoring.

**4.45(6) Terms of participation.** A licensee shall agree to comply with the terms for participation in the impaired licensee program established in a contract. Conditions placed upon the licensee and the duration of the monitoring period shall be established by the committee and communicated to the licensee in writing.

**4.45(7) Noncompliance.** Failure to comply with the provisions of the agreement shall require the committee to make immediate referral of the matter to the board for purpose of disciplinary action.

**4.45(8) Practice restrictions.** The committee may impose restrictions on the licensee's practice as a term of the contract until such time as it receives a report from an approved evaluator that the licensee is capable of practicing with reasonable safety and skill. As a condition of participating in the program, a licensee is required to agree to restricted practice in accordance with the terms specified in the contract. In the event that the licensee refuses to agree to or comply with the restrictions established in the contract, the committee shall refer the licensee to the board for appropriate action.

**4.45(9) Limitations.** The committee establishes the terms and monitors a participant's compliance with the program specified in the contract. The committee is not responsible for participants who fail to comply with the terms of or suc-

cessfully complete the impaired licensee program. Participation in the program under the auspices of the committee shall not relieve the board of any duties and shall not divest the board of any authority or jurisdiction otherwise provided. Any violation of the statutes or rules governing the practice of the licensee's profession by a participant shall be referred to the board for appropriate action.

**4.45(10) Confidentiality.** The committee is subject to the provisions governing confidentiality established in Iowa Code section 272C.6. Accordingly, information in the possession of the board or the committee about licensees in the program shall not be disclosed to the public. Participation in the impaired licensee program under the auspices of the committee is not a matter of public record.

**193D—4.46(252J) Certificates of noncompliance.** The board shall suspend or revoke a certificate of registration upon the receipt of a certificate of noncompliance from the child support recovery unit of the department of human services according to the procedures in Iowa Code chapter 252J. In addition to the procedures set forth in chapter 252J, this rule shall apply.

**4.46(1)** The notice required by Iowa Code section 252J.8 shall be served upon the registrant by restricted certified mail, return receipt requested, or personal service in accordance with Rule of Civil Procedure 56.1. Alternatively, the registrant may accept service personally or through authorized counsel.

**4.46(2)** The effective date of revocation or suspension of a certificate of registration, as specified in the notice required by Iowa Code section 252J.8, shall be 60 days following service of the notice upon the registrant.

**4.46(3)** The board's executive secretary is authorized to prepare and serve the notice required by Iowa Code section 252J.8 and is directed to notify the registrant that the certificate of registration will be suspended, unless the registration is already suspended on other grounds. In the event a registration is on suspension, the executive secretary shall notify the registrant of the board's intent to revoke the certificate of registration.

**4.46(4)** Registrants shall keep the board informed of all court actions, and all child support recovery unit actions taken under or in connection with Iowa Code chapter 252J, and shall provide the board copies, within seven days of filing or issuance, of all applications filed with the district court pursuant to Iowa Code section 252J.9, all court orders entered in such actions, and withdrawals of certificates of noncompliance by the child support recovery unit.

**4.46(5)** All board fees for license renewal or reinstatement must be paid by registrants before a certificate of registration will be renewed or reinstated after the board has suspended or revoked a license pursuant to Iowa Code chapter 252J.

**4.46(6)** In the event a registrant files a timely district court action following service of a board notice pursuant to Iowa Code sections 252J.8 and 252J.9, the board shall continue with the intended action described in the notice upon the receipt of a court order lifting the stay, dismissing the action, or otherwise directing the board to proceed. For purposes of determining the effective date of suspension or revocation of a certificate of registration, the board shall count the number of days before the action was filed and the number of days after the action was disposed of by the court.

**4.46(7)** The board shall notify the registrant in writing through regular first-class mail, or such other means as the board deems appropriate in the circumstances, within ten days of the effective date of the suspension or revocation of a

## LANDSCAPE ARCHITECTURAL EXAMINING BOARD[193D](cont'd)

certificate of registration, and shall similarly notify the registrant or applicant when the certificate of registration is issued or renewed following the board's receipt of a withdrawal of the certificate of noncompliance.

**193D—4.47(261) Suspension or revocation of a certificate of registration—student loan.** The board shall suspend or revoke a certificate of registration upon receipt of a certificate of noncompliance from the college student aid commission according to the procedures set forth in Iowa Code section 261.126. In addition to those procedures, this rule shall apply.

**4.47(1)** The notice required by Iowa Code section 261.126 shall be served by restricted certified mail, return receipt requested, or by personal service in accordance with the Iowa Rules of Civil Procedure. Alternatively, the registrant may accept service personally or through authorized counsel.

**4.47(2)** The effective date of revocation or suspension of a certificate of registration, as specified in the notice required by Iowa Code section 261.126, shall be 60 days following service of the notice upon the registrant.

**4.47(3)** The board's executive secretary is authorized to prepare and serve the notice required by Iowa Code section 261.126, and is directed to notify the licensee that the certificate of registration will be suspended, unless the certificate of registration is already suspended on other grounds. In the event a certificate of registration is on suspension, the executive secretary shall notify the registrant of the board's intention to revoke the certificate of licensure.

**4.47(4)** Registrants shall keep the board informed of all court actions and all college student aid commission actions taken under or in connection with Iowa Code chapter 261 and shall provide the board copies, within seven days of filing or issuance, of all applications filed with the district court pursuant to Iowa Code section 261.127, all court orders entered in such actions, and withdrawals of certificates of noncompliance by the college student aid commission.

**4.47(5)** All board fees required for registration renewal or registration reinstatement must be paid by registrants and all continuing education requirements must be met before a certificate of registration will be renewed or reinstated after the board has suspended or revoked a license pursuant to Iowa Code chapter 261.

**4.47(6)** In the event a registrant timely files a district court action following service of a board notice pursuant to Iowa Code sections 261.126 and 261.127, the board shall continue with the intended action described in the notice upon the receipt of a court order lifting the stay, dismissing the action, or otherwise directing the board to proceed. For purposes of determining the effective date of the denial of the issuance or renewal of a certificate of registration, the board shall count the number of days before the action was filed and the number of days after the action was disposed of by the court.

**4.47(7)** The board shall notify the registrant in writing through regular first-class mail, or such other means as the board deems appropriate in the circumstances, within ten days of the effective date of the suspension or revocation of a certificate of registration, and shall similarly notify the registrant when the certificate of registration is reinstated following the board's receipt of a withdrawal of the certificate of noncompliance.

These rules are intended to implement Iowa Code chapters 17A, 252J, 272C, and 544B and Iowa Code sections 261.126 and 261.127.

ITEM 3. Adopt new rule 193D—5.17(261) as follows:

**193D—5.17(261) Sharing information with the college student aid commission.** Notwithstanding any statutory confidentiality provision, the board may share information with the college student aid commission for the sole purpose of identifying licensees or applicants subject to enforcement under Iowa Code sections 261.126 and 261.127.

ITEM 4. Rescind 193D—Chapter 7 and adopt the following new chapter in lieu thereof:

**CHAPTER 7  
PETITION FOR RULE MAKING  
AND FOR DECLARATORY ORDERS**

**193D—7.1(17A) Petition for rule making.** Any person or board may file a petition for rule making with the board. A petition is deemed filed when it is received by that office. The board must provide the petitioner with a file-stamped copy of the petition if the petitioner provides the board an extra copy for this purpose. The petition must be typewritten, or legibly handwritten in ink, and must substantially conform to the following form:

LANDSCAPE ARCHITECTURAL EXAMINING BOARD

Petition by (Name of Petitioner) for the (adoption, amendment, or repeal) of rules relating to (state subject matter).	}	PETITION FOR RULE MAKING
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The petition must provide the following information:

1. A statement of the specific rule-making action sought by the petitioner including the text or a summary of the contents of the proposed rule or amendment to a rule and, if it is a petition to amend or repeal a rule, a citation and the relevant language to the particular portion or portions of the rule proposed to be amended or repealed.

2. A citation to any law deemed relevant to the board's authority to take the action urged or to the desirability of that action.

3. A brief summary of petitioner's arguments in support of the action urged in the petition.

4. A brief summary of any data supporting the action urged in the petition.

5. The names and addresses of other persons, or a description of any class of persons, known by petitioner to be affected by, or interested in, the proposed action which is the subject of the petition.

6. Any request by petitioner for a meeting provided for by rule 7.4(17A).

**7.1(1)** The petition must be dated and signed by the petitioner or the petitioner's representative. It must also include the name, mailing address, and telephone number of the petitioner and petitioner's representative, and a statement indicating the person to whom communications concerning the petition should be directed.

**7.1(2)** The board may deny a petition because it does not substantially conform to the required form.

**193D—7.2(17A) Briefs.** The petitioner may attach a brief to the petition in support of the action urged in the petition. The board may request a brief from the petitioner or from any other person concerning the substance of the petition.

**193D—7.3(17A) Inquiries.** Inquiries concerning the status of a petition for rule making may be made to the executive secretary.

LANDSCAPE ARCHITECTURAL EXAMINING BOARD[193D](cont'd)

193D—7.4(17A) Board consideration.

7.4(1) Within 14 days after the filing of a petition, the board must submit a copy of the petition and any accompanying brief to the administrative rules coordinator and to the administrative rules review committee. Upon request by petitioner in the petition, the board must schedule a brief and informal meeting between the petitioner and the board, a member of the board, or a member of the staff of the board, to discuss the petition. The board may request the petitioner to submit additional information or argument concerning the petition. The board may also solicit comments from any person on the substance of the petition. Also, comments on the substance of the petition may be submitted to the board by any person.

7.4(2) Within 60 days after the filing of the petition, or within any longer period agreed to by the petitioner, the board must, in writing, deny the petition, and notify petitioner of its action and the specific grounds for the denial, or grant the petition and notify petitioner that it has instituted rule-making proceedings on the subject of the petition. Petitioner shall be deemed notified of the denial or grant of the petition on the date when the board mails or delivers the required notification to petitioner.

7.4(3) Denial of a petition because it does not substantially conform to the required form does not preclude the filing of a new petition on the same subject that seeks to eliminate the grounds for the board's rejection of the petition.

193D—7.5(17A) Petition for declaratory order. Any person may file a petition with the board for a declaratory order as to the applicability to specified circumstances of a statute, rule, or order within the primary jurisdiction of the board at the board's offices. A petition is deemed filed when it is received by that office. The board shall provide the petitioner with a file-stamped copy of the petition if the petitioner provides the board an extra copy for this purpose. The petition must be typewritten or legibly handwritten in ink and must substantially conform to the following form:

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LANDSCAPE ARCHITECTURAL EXAMINING BOARD

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Petition by (Name of Petitioner) for a Declaratory Order on (Cite provisions of law involved).	}	<b>PETITION FOR DECLARATORY ORDER</b>
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The petition must provide the following information:

1. A clear and concise statement of all relevant facts on which the order is requested.
2. A citation and the relevant language of the specific statutes, rules, policies, decisions, or orders whose applicability is questioned, and any other relevant law.
3. The questions the petitioner wants answered, stated clearly and concisely.
4. The answers to the questions desired by the petitioner and a summary of the reasons urged by the petitioner in support of those answers.
5. The reasons for requesting the declaratory order and disclosure of the petitioner's interest in the outcome.
6. A statement indicating whether the petitioner is currently a party to another proceeding involving the questions at issue and whether, to the petitioner's knowledge, those questions have been directed by, are pending determination by, or are under investigation by, any governmental entity.

7. The names and addresses of other persons, or a description of any class of persons, known by petitioner to be affected by, or interested in, the questions in the petition.

8. Any request by petitioner for a meeting provided for by 7.11(17A). The petition must be dated and signed by the petitioner or the petitioner's representative. It must also include the name, mailing address, and telephone number of the petitioner and petitioner's representative, and a statement indicating the person to whom communications concerning the petition should be directed.

193D—7.6(17A) Notice of petition. Within ten days after receipt of a petition for a declaratory order, the board shall give notice of the petition to all persons not served by the petitioner pursuant to 7.10(17A) to whom notice is required by any provision of law. The board may also give notice to any other persons.

193D—7.7(17A) Intervention.

7.7(1) Persons who qualify under any applicable provision of law as an intervenor and who file a petition for intervention within 20 days of the filing of a petition for declaratory order shall be allowed to intervene in a proceeding for a declaratory order.

7.7(2) Any person who files a petition for intervention at any time prior to the issuance of an order may be allowed to intervene in a proceeding for a declaratory order at the discretion of the board.

7.7(3) A petition for intervention shall be filed at the board's offices. Such a petition is deemed filed when it is received by that office. The board will provide the petitioner with a file-stamped copy of the petition for intervention if the petitioner provides an extra copy for this purpose. A petition for intervention must be typewritten or legibly handwritten in ink and must substantially conform to the following form:

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LANDSCAPE ARCHITECTURAL EXAMINING BOARD

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Petition by (Name of Original Petitioner) for a Declaratory Order on (Cite provisions of law cited in original petition).	}	<b>PETITION FOR INTERVENTION</b>
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The petition for intervention must provide the following information:

1. Facts supporting the intervenor's standing and qualifications for intervention.
  2. The answers urged by the intervenor to the question or questions presented and a summary of the reasons urged in support of those answers.
  3. Reasons for requesting intervention and disclosure of the intervenor's interest in the outcome.
  4. A statement indicating whether the intervenor is currently a party to any proceeding involving the questions at issue and whether, to the intervenor's knowledge, those questions have been decided by, are pending determination by, or are under investigation by, any governmental entity.
  5. The names and addresses of any additional persons, or a description of any additional class of persons, known by the intervenor to be affected by, or interested in, the questions presented.
  6. Whether the intervenor consents to be bound by the determination of the matters presented in the declaratory order proceeding.
- The petition must be dated and signed by the intervenor or the intervenor's representative. It must also include the

## LANDSCAPE ARCHITECTURAL EXAMINING BOARD[193D](cont'd)

name, mailing address, and telephone number of the intervenor and intervenor's representative, and a statement indicating the person to whom communications should be directed.

**193D—7.8(17A) Briefs.** The petitioner or intervenor may file a brief in support of the position urged. The board may request a brief from the petitioner, any intervenor, or any other person concerning the questions raised in the petition.

**193D—7.9(17A) Inquiries.** Inquiries concerning the status of a declaratory order may be made to the executive secretary of the board at the board's offices.

**193D—7.10(17A) Service and filing of petitions and other papers.**

**7.10(1) When service required.** Except where otherwise provided by law, every petition for declaratory order, petition for intervention, brief, or other paper filed in a proceeding for a declaratory order shall be served upon each of the parties of record to the proceeding, and on all other persons identified in the petition for declaratory order or petition for intervention as affected by or interested in the questions presented, simultaneously with its filing. The party filing a document is responsible for service on all parties and other affected or interested persons.

**7.10(2) Filing—when required.** All petitions for declaratory orders, petitions for intervention, briefs, or other papers in a proceeding for a declaratory order shall be filed with the board at the board's offices. All petitions, briefs, or other papers are required to be served upon a party shall be filed simultaneously with the board.

**7.10(3) Method of service, time of filing, and proof of mailing.** Method of service, time of filing, and proof of mailing shall be as provided by 193D—4.20(17A).

**193D—7.11(17A) Board consideration.** Upon request by petitioner, the board must schedule a brief and informal meeting between the original petitioner, all intervenors, and the board, a member of the board, or a member of the staff of the board to discuss the questions raised. The board may solicit comments from any person on the questions raised. Also, comments on the questions raised may be submitted to the board by any person.

**193D—7.12(17A) Action on petition.**

**7.12(1) Within the time allowed after receipt of a petition for a declaratory order, the board shall take action on the petition within 30 days after receipt as required by 1998 Iowa Acts, chapter 1202, section 13(5).**

**7.12(2) The date of issuance of an order or of a refusal to issue an order is as defined in 193D—1.1(544B,17A).**

**193D—7.13(17A) Refusal to issue order.** The board shall not issue a declaratory order where prohibited by 1998 Iowa Acts, chapter 1202, section 13(1), and may refuse to issue a declaratory order on some or all questions raised for the following reasons:

1. The petition does not substantially comply with the required form.

2. The petition does not contain facts sufficient to demonstrate that the petitioner will be aggrieved or adversely affected by the failure of the board to issue an order.

3. The board does not have jurisdiction over the questions presented in the petition.

4. The questions presented by the petition are also presented in current rule making, contested case, or other board or judicial proceeding that may definitively resolve them.

5. The questions presented by the petition would more properly be resolved in a different type of proceeding or by another body with jurisdiction over the matter.

6. The facts or questions presented in the petition are unclear, overbroad, insufficient, or otherwise inappropriate as a basis upon which to issue an order.

7. There is no need to issue an order because the questions raised in the petition have been settled due to a change in circumstances.

8. The petition is not based upon facts calculated to aid in the planning of future conduct but is, instead, based solely upon prior conduct in an effort to establish the effect of that conduct or to challenge a board decision already made.

9. The petition requests a declaratory order that would necessarily determine the legal rights, duties, or responsibilities of other persons who have not joined in the petition or filed a similar petition and whose position on the questions presented may fairly be presumed to be adverse to that of petitioner.

10. The petitioner requests the board to determine whether a statute is unconstitutional on its face.

**7.13(1) A refusal to issue a declaratory order must indicate the specific grounds for the refusal and constitutes final board action on the petition.**

**7.13(2) Refusal to issue a declaratory order pursuant to this provision does not preclude the filing of a new petition that seeks to eliminate the grounds for refusal to issue an order.**

**193D—7.14(17A) Contents of declaratory order—effective date.** In addition to the order itself, a declaratory order must contain the date of its order, the name of petitioner, intervenors, the specific statutes, rules, policies, decisions, or orders involved, the particular facts upon which it is based, and the reasons for its conclusion. A declaratory order is effective on the date of issuance.

**193D—7.15(17A) Copies of orders.** A copy of all orders issued in response to a petition for a declaratory order shall be mailed promptly to the original petitioner and all intervenors.

**193D—7.16(17A) Effect of a declaratory order.** A declaratory order has the same status and binding effect as a final order in a contested case proceeding. It is binding on the board, the petitioner and any intervenors and is applicable only in circumstances where the relevant facts and the law involved are indistinguishable from those on which the order was based. As to all other persons, a declaratory order serves only as precedent and is not binding on the board. The issuance of a declaratory order constitutes final board action on the petition.

**ARC 8825A**

## LATINO AFFAIRS DIVISION[433]

### Notice of Intended Action

Twenty-five interested persons, a governmental subdivision, an agency or association of 25 or more persons may demand an oral presentation hereon as provided in Iowa Code section 17A.4(1)"b."

Notice is also given to the public that the Administrative Rules Review Committee may, on its own motion or on written request by any individual or group, review this proposed action under section 17A.8(6) at a regular or special meeting where the public or interested persons may be heard.

Pursuant to the authority of Iowa Code sections 17A.3 and 216A.116, the Division of Latino Affairs, Department of Human Rights hereby gives Notice of Intended Action to adopt

## LATINO AFFAIRS DIVISION[433](cont'd)

Chapter 3, "Petitions for Rule Making," Chapter 4, "Agency Procedures for Rule Making," Chapter 5, "Declaratory Orders," and Chapter 7, "Contested Cases," Iowa Administrative Code.

Chapters 3, 4, 5 and 7 will govern petitions for rule making, procedures for rule making, declaratory orders and contested cases.

The Seventy-seventh General Assembly in 1998 Iowa Acts, chapter 1202, passed amendments to the Iowa administrative procedure Act. The Attorney General's Office drafted amendments to the Uniform Rules of Agency Procedure to implement the amendments to the Iowa Administrative Procedure Act. The Division is adopting the uniform rules which become effective July 1, 1999.

Any interested person may make written suggestions or comments on these proposed amendments on or before April 13, 1999. Such written materials should be directed to the Administrator, Division of Latino Affairs, Iowa Department of Human Rights, Lucas State Office Building, First Floor, Des Moines, Iowa 50319; fax (515)242-6119.

Persons are also invited to present oral or written suggestions or comments at a public hearing which will be held on April 13, 1999, at 10 a.m. in the Director's Conference Room, Department of Human Rights, Lucas State Office Building, Des Moines, Iowa 50319. At the hearing, persons will be asked to confine their remarks to the subjects of the amendments.

Any persons who intend to attend a public hearing and have special requirements such as hearing or mobility impairments should contact the Division of Latino Affairs and advise of specific needs.

These amendments are intended to implement Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202, and Iowa Code section 216A.116.

The following amendments are proposed.

Adopt the following new chapters:

## CHAPTER 3

## PETITIONS FOR RULE MAKING

**433—3.1(17A) Adoption by reference.** The division of Latino affairs hereby adopts the petitions for rule making segment of the Uniform Rules on Agency Procedure which are printed in the first volume of the Iowa Administrative Code, with the following amendments:

1. In lieu of the words "(designate office)", insert "Division of Latino Affairs, Department of Human Rights, Lucas State Office Building, Des Moines, Iowa 50319".

2. In lieu of the words "(AGENCY NAME)", insert "DIVISION OF LATINO AFFAIRS".

3. In lieu of the words "(designate official by full title and address)", insert "Administrator, Division of Latino Affairs, Department of Human Rights, Lucas State Office Building, Des Moines, Iowa 50319".

These rules are intended to implement Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202.

## CHAPTER 4

## AGENCY PROCEDURE FOR RULE MAKING

**433—4.1(17A) Adoption by reference.** The division of Latino affairs hereby adopts the agency procedure for rule making segment of the Uniform Rules on Agency Procedure which are printed in the first volume of the Iowa Administrative Code, with the following amendments:

1. In lieu of the words "(commission, board, council, director)", insert "administrator".

2. In lieu of the words "(specify time period)", insert "one year".

3. In lieu of the words "(identify office and address)", insert "Administrator, Division of Latino Affairs, Department of Human Rights, Lucas State Office Building, Des Moines, Iowa 50319".

4. In lieu of the words "(designate office and telephone number)", insert "the administrator at (515)281-4070".

5. In lieu of the words "(designate office)", insert "Division of Latino Affairs, Department of Human Rights, Lucas State Office Building, Des Moines, Iowa 50319".

6. In lieu of the words "(specify the office and address)", insert "Division of Latino Affairs, Department of Human Rights, Lucas State Office Building, Des Moines, Iowa 50319".

7. In lieu of the words "(agency head)", insert "administrator".

These rules are intended to implement Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202.

## CHAPTER 5

## DECLARATORY ORDERS

**433—5.1(17A) Adoption by reference.** The division of Latino affairs hereby adopts the declaratory orders segment of the Uniform Rules on Agency Procedure which are printed in the first volume of the Iowa Administrative Code, with the following amendments:

1. In lieu of the words "(designate agency)", insert "division of Latino affairs".

2. In lieu of the words "(designate office)", insert "Division of Latino Affairs, Department of Human Rights, Lucas State Office Building, Des Moines, Iowa 50319".

3. In lieu of the words "(AGENCY NAME)", insert "DIVISION OF LATINO AFFAIRS".

4. In lieu of the words "\_\_\_\_ days (15 or less)", insert "10 days".

5. In lieu of the words "\_\_\_\_ days" in subrule 6.3(1), insert "20 days".

6. In lieu of the words "(designate official by full title and address)", insert "Administrator, Division of Latino Affairs, Department of Human Rights, Lucas State Office Building, Des Moines, Iowa 50319".

7. In lieu of the words "(specify office and address)", insert "Division of Latino Affairs, Department of Human Rights, Lucas State Office Building, Des Moines, Iowa 50319".

8. In lieu of the words "(agency name)", insert "division of Latino affairs".

9. In lieu of the words "(designate agency head)", insert "administrator".

These rules are intended to implement Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202.

## CHAPTER 7

## CONTESTED CASES

**433—7.1(17A) Adoption by reference.** The division of Latino affairs hereby adopts the contested cases segment of the Uniform Rules on Agency Procedure which are printed in the first volume of the Iowa Administrative Code, with the following amendments:

1. In lieu of the words "(agency name)", insert "division of Latino affairs, department of human rights".

2. In lieu of the words "(designate official)", insert "administrator".

3. In subrule 7.3(2) delete the words "or by (specify rule number)".

LATINO AFFAIRS DIVISION[433](cont'd)

- 4. In lieu of the words "(agency specifies class of contested case)", insert "division contested cases".
- 5. In lieu of the words "(specify office and address)", insert "Division of Latino Affairs, Department of Human Rights, Lucas State Office Building, Des Moines, Iowa 50319".
- 6. In lieu of the words "(designate office)", insert "Division of Latino Affairs".
- 7. In lieu of the words "(agency to designate person to whom violations should be reported)", insert "administrator".
- 8. In lieu of the words "(board, commission, director)", insert "administrator".
- 9. In lieu of the words "(the agency)", insert "division of Latino affairs".

These rules are intended to implement Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202.

ARC 8830A

LAW ENFORCEMENT ACADEMY[501]

Notice of Intended Action

Twenty-five interested persons, a governmental subdivision, an agency or association of 25 or more persons may demand an oral presentation hereon as provided in Iowa Code section 17A.4(1)"b."

Notice is also given to the public that the Administrative Rules Review Committee may, on its own motion or on written request by any individual or group, review this proposed action under section 17A.8(6) at a regular or special meeting where the public or interested persons may be heard.

Pursuant to the authority of Iowa Code sections 17A.3 and 80B.11, the Iowa Law Enforcement Academy gives Notice of Intended Action to amend Chapter 6, "Decertification," and to adopt Chapter 14, "Declaratory Orders," and Chapter 15, "Contested Cases," Iowa Administrative Code.

By proposing these new chapters and the amendment to Chapter 6, the Iowa Law Enforcement Academy will implement, as closely as is practicable for this agency, the Uniform Rules on Agency Procedure that comply with the amendments to Iowa Code chapter 17A [1998 Iowa Acts, chapter 1202] that become effective July 1, 1999. By so doing, administrative practice before the agency will be facilitated and will be substantially the same in the areas addressed as with all other agencies of state government.

Any interested person may make written comments or suggestions on these proposed amendments on or before April 13, 1999. Such written materials should be sent to Gene W. Shepard, Director, Iowa Law Enforcement Academy, P.O. Box 130, Johnston, Iowa 50131-0130, or faxed to (515)242-5471.

There will be a public hearing on these proposed amendments on April 13, 1999, at 10 a.m. in the library at the Iowa Law Enforcement Academy, Camp Dodge, Johnston, Iowa, at which time persons may present their views orally or in writing. At the hearing, persons will be asked to give their names and addresses for the record and to confine their remarks to the subject of the amendments.

These amendments were approved by the Iowa Law Enforcement Academy Council on March 3, 1999.

These amendments are intended to implement Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202, and chapter 80B.

The following amendments are proposed.

ITEM 1. Amend subparagraph 6.2(2)"d"(4) as follows: (4) Upon receipt by the academy of a recommendation for decertification, the Iowa law enforcement academy council may commence decertification procedures by causing a notice and petition to be served upon the officer as provided by subrule 6.3(2), with a copy of the recommendation for decertification attached thereto.

ITEM 2. Rescind and reserve rules 501-6.3(80B) and 501-6.4(80B).

ITEM 3. Adopt the following new chapter:

CHAPTER 14 DECLARATORY ORDERS

501-14.1(17A) Petition for declaratory order. Any person may file a petition with the academy for a declaratory order as to the applicability to specified circumstances of a statute, rule, or order within the primary jurisdiction of the academy, at Iowa Law Enforcement Academy, Attn: Rules Coordinator, P.O. Box 130, Johnston, Iowa 50131. A petition is deemed filed when it is received by that office. The academy shall provide the petitioner with a file-stamped copy of the petition if the petitioner provides the academy an extra copy for this purpose. The petition must be typewritten or legibly handwritten in ink and must substantially conform to the following form:

IOWA LAW ENFORCEMENT ACADEMY

Petition by (Name of Petitioner) for a Declaratory Order on (Cite provisions of law involved). PETITION FOR DECLARATORY ORDER

The petition must provide the following information:

- 1. A clear and concise statement of all relevant facts on which the order is requested.
- 2. A citation and the relevant language of the specific statutes, rules, policies, decisions, or orders, whose applicability is questioned, and any other relevant law.
- 3. The questions petitioner wants answered, stated clearly and concisely.
- 4. The answers to the questions desired by the petitioner and a summary of the reasons urged by the petitioner in support of those answers.
- 5. The reasons for requesting the declaratory order and disclosure of the petitioner's interest in the outcome.
- 6. A statement indicating whether the petitioner is currently a party to another proceeding involving the questions at issue and whether, to the petitioner's knowledge, those questions have been decided by, are pending determination by, or are under investigation by, any governmental entity.
- 7. The names and addresses of other persons, or a description of any class of persons, known by petitioner to be affected by, or interested in, the questions presented in the petition.
- 8. Any request by petitioner for a meeting provided for by 14.7(17A).

The petition must be dated and signed by the petitioner or the petitioner's representative. It must also include the name, mailing address, and telephone number of the petitioner and petitioner's representative and a statement indi-

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cating the person to whom communications concerning the petition should be directed.

**501—14.2(17A) Notice of petition.** Within 15 days after receipt of a petition for a declaratory order, the academy shall give notice of the petition to all persons not served by the petitioner pursuant to 14.6(17A) to whom notice is required by any provision of law. The academy may also give notice to any other persons.

**501—14.3(17A) Intervention.**

**14.3(1)** Persons who qualify under any applicable provision of law as an intervenor and who file a petition for intervention within 14 days of the filing of a petition for declaratory order shall be allowed to intervene in a proceeding for a declaratory order.

**14.3(2)** Any person who files a petition for intervention at any time prior to the issuance of an order may be allowed to intervene in a proceeding for a declaratory order at the discretion of the academy.

**14.3(3)** A petition for intervention shall be filed at Iowa Law Enforcement Academy, Attn: Rules Coordinator, P.O. Box 130, Johnston, Iowa 50131. Such a petition is deemed filed when it is received by that office. The academy will provide the petitioner with a file-stamped copy of the petition for intervention if the petitioner provides an extra copy for this purpose. A petition for intervention must be typewritten or legibly handwritten in ink and must substantially conform to the following form:

IOWA LAW ENFORCEMENT ACADEMY

Petition by (Name of Original Petitioner) for a Declaratory Order on (Cite provisions of law cited in original petition).	}	PETITION FOR INTERVENTION
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The petition for intervention must provide the following information:

1. Facts supporting the intervenor's standing and qualifications for intervention.
2. The answers urged by the intervenor to the question or questions presented and a summary of the reasons urged in support of those answers.
3. Reasons for requesting intervention and disclosure of the intervenor's interest in the outcome.
4. A statement indicating whether the intervenor is currently a party to any proceeding involving the questions at issue and whether, to the intervenor's knowledge, those questions have been decided by, are pending determination by, or are under investigation by, any governmental entity.
5. The names and addresses of any additional persons, or a description of any additional class of persons, known by the intervenor to be affected by, or interested in, the questions presented.
6. Whether the intervenor consents to be bound by the determination of the matters presented in the declaratory order proceeding.

The petition must be dated and signed by the intervenor or the intervenor's representative. It must also include the name, mailing address, and telephone number of the intervenor and intervenor's representative, and a statement indicating the person to whom communications should be directed.

**501—14.4(17A) Briefs.** The petitioner or any intervenor may file a brief in support of the position urged. The academy

may request a brief from the petitioner, any intervenor, or any other person concerning the questions raised.

**501—14.5(17A) Inquiries.** Inquiries concerning the status of a declaratory order proceeding may be made to Iowa Law Enforcement Academy, Attn: Rules Coordinator, P.O. Box 130, Johnston, Iowa 50131.

**501—14.6(17A) Service and filing of petitions and other papers.**

**14.6(1)** When service required. Except where otherwise provided by law, every petition for declaratory order, petition for intervention, brief, or other paper filed in a proceeding for a declaratory order shall be served upon each of the parties of record to the proceeding, and on all other persons identified in the petition for declaratory order or petition for intervention as affected by or interested in the questions presented, simultaneously with their filing. The party filing a document is responsible for service on all parties and other affected or interested persons.

**14.6(2)** Filing—when required. All petitions for declaratory orders, petitions for intervention, briefs, or other papers in a proceeding for a declaratory order shall be filed with the academy. All petitions, briefs, or other papers that are required to be served upon a party shall be filed simultaneously with the academy.

**14.6(3)** Method of service, time of filing, and proof of mailing. Method of service, time of filing, and proof of mailing shall be as provided by rule 501—15.12(17A).

**501—14.7(17A) Consideration.** Upon request by petitioner, the director must schedule a brief and informal meeting between the original petitioner, all intervenors, and the academy council, a member of the academy council, or a member of the staff of the academy, to discuss the questions raised. The director of the academy council may solicit comments from any person on the questions raised. Also, comments on the questions raised may be submitted to the academy council by any person.

**501—14.8(17A) Action on petition.**

**14.8(1)** Within the time allowed by 1998 Iowa Acts, chapter 1202, section 13(5), after receipt of a petition for a declaratory order, the academy council shall take action on the petition as required by 1998 Iowa Acts, chapter 1202, section 13(5).

**14.8(2)** The date of issuance of an order or of a refusal to issue an order is as defined in rule 501—15.2(17A).

**501—14.9(17A) Refusal to issue order.**

**14.9(1)** The academy council shall not issue a declaratory order where prohibited by 1998 Iowa Acts, chapter 1202, section 13(1), and may refuse to issue a declaratory order on some or all questions raised for the following reasons:

1. The petition does not substantially comply with the required form.
2. The petition does not contain facts sufficient to demonstrate that the petitioner will be aggrieved or adversely affected by the failure of the academy to issue an order.
3. The academy does not have jurisdiction over the questions presented in the petition.
4. The questions presented by the petition are also presented in a current rule making, contested case, or other academy or judicial proceeding, that may definitively resolve them.

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5. The questions presented by the petition would more properly be resolved in a different type of proceeding or by another body with jurisdiction over the matter.

6. The facts or questions presented in the petition are unclear, overbroad, insufficient, or otherwise inappropriate as a basis upon which to issue an order.

7. There is no need to issue an order because the questions raised in the petition have been settled due to a change in circumstances.

8. The petition is not based upon facts calculated to aid in the planning of future conduct but is, instead, based solely upon prior conduct in an effort to establish the effect of that conduct or to challenge an academy decision already made.

9. The petition requests a declaratory order that would necessarily determine the legal rights, duties, or responsibilities of other persons who have not joined in the petition, intervened separately, or filed a similar petition and whose position on the questions presented may fairly be presumed to be adverse to that of petitioner.

10. The petitioner requests the academy to determine whether a statute is unconstitutional on its face.

**14.9(2)** A refusal to issue a declaratory order must indicate the specific grounds for the refusal and constitutes final academy action on the petition.

**14.9(3)** Refusal to issue a declaratory order pursuant to this provision does not preclude the filing of a new petition that seeks to eliminate the grounds for the refusal to issue an order.

**501—14.10(17A) Contents of declaratory order—effective date.** In addition to the order itself, a declaratory order must contain the date of its issuance, the name of petitioner and all intervenors, the specific statutes, rules, policies, decisions, or orders involved, the particular facts upon which it is based, and the reasons for its conclusion.

A declaratory order is effective on the date of issuance.

**501—14.11(17A) Copies of orders.** A copy of all orders issued in response to a petition for a declaratory order shall be mailed promptly to the original petitioner and all intervenors.

**501—14.12(17A) Effect of a declaratory order.** A declaratory order has the same status and binding effect as a final order issued in a contested case proceeding. It is binding on the academy council, the petitioner, and any intervenors and is applicable only in circumstances where the relevant facts and the law involved are indistinguishable from those on which the order was based. As to all other persons, a declaratory order serves only as precedent and is not binding on the academy. The issuance of a declaratory order constitutes final academy action on the petition.

These rules are intended to implement Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202, and chapter 80B.

ITEM 4. Adopt the following new chapter:

**CHAPTER 15  
CONTESTED CASES**

**501—15.1(17A) Scope and applicability.** Except when inconsistent with Iowa Code chapter 80B, this chapter applies to contested case proceedings conducted by the Iowa law enforcement academy council.

**501—15.2(17A) Definitions.** Except where otherwise specifically defined by law:

“Contested case” means a proceeding defined by Iowa Code section 17A.2(5) and includes any matter defined as a

no factual dispute contested case under 1998 Iowa Acts, chapter 1202, section 14.

“Issuance” means the date of mailing of a decision or order or date of delivery if service is by other means unless another date is specified in the order.

“Party” means each person or agency named or admitted as a party or properly seeking and entitled as of right to be admitted as a party.

“Presiding officer” means the administrative law judge or, under certain circumstances, the council or a designated panel thereof.

“Proposed decision” means the presiding officer’s recommended findings of fact, conclusions of law, decision, and order in a contested case in which the Iowa law enforcement academy council did not preside.

**501—15.3(17A) Time requirements.**

**15.3(1)** Time shall be computed as provided in Iowa Code subsection 4.1(34).

**15.3(2)** For good cause, the presiding officer may extend or shorten the time to take any action, except as precluded by statute. Except for good cause stated in the record, before extending or shortening the time to take any action, the presiding officer shall afford all parties an opportunity to be heard or to file written arguments.

**501—15.4(17A) Requests for contested case proceeding.** Any person claiming an entitlement to a contested case proceeding shall file a written request for such a proceeding within the time specified by the particular rules or statutes governing the subject matter or, in the absence of such law, the time specified in the council action in question.

The request for a contested case proceeding should state the name and address of the requester, identify the specific council action which is disputed, and where the requester is represented by a lawyer identify the provisions of law or precedent requiring or authorizing the holding of a contested case proceeding in the particular circumstances involved, and include a short and plain statement of the issues of material fact in dispute.

**501—15.5(17A) Notice of hearing.**

**15.5(1)** Delivery. Delivery of the notice of hearing constitutes the commencement of the contested case proceeding. Delivery may be executed by:

- a. Personal service as provided in the Iowa Rules of Civil Procedure; or
- b. Certified mail, return receipt requested; or
- c. First-class mail; or
- d. Publication, as provided in the Iowa Rules of Civil Procedure.

**15.5(2)** Contents. The notice of hearing shall contain the following information:

- a. A statement of the time, place, and nature of the hearing;
- b. A statement of the legal authority and jurisdiction under which the hearing is to be held;
- c. A reference to the particular sections of the statutes and rules involved;
- d. A short and plain statement of the matters asserted. If the council or other party is unable to state the matters in detail at the time the notice is served, the initial notice may be limited to a statement of the issues involved. Thereafter, upon application, a more definite and detailed statement shall be furnished;
- e. Identification of all parties including the name, address and telephone number of the person who will act as ad-

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vocate for the council or the state and of parties' counsel where known;

f. Reference to the procedural rules governing conduct of the contested case proceeding;

g. Reference to the procedural rules governing informal settlement;

h. Identification of the presiding officer, if known. If not known, a description of who will serve as presiding officer (e.g., council, designated panel of the council, administrative law judge from the department of inspections and appeals); and

i. Notification of the time period in which a party may request, pursuant to 1998 Iowa Acts, chapter 1202, section 15(1), and rule 15.6(17A), that the presiding officer be an administrative law judge.

**501—15.6(17A) Presiding officer.**

**15.6(1)** Any party who wishes to request that the presiding officer assigned to render a proposed decision be an administrative law judge employed by the department of inspections and appeals must file a written request within 20 days after service of a notice of hearing which identifies or describes the presiding officer as the council head or members of the council.

**15.6(2)** The council or its designee may deny the request only upon a finding that one or more of the following apply:

a. Neither the council nor any officer of the council under whose authority the contested case is to take place is a named party to the proceeding or a real party in interest to that proceeding.

b. There is a compelling need to expedite issuance of a final decision in order to protect the public health, safety, or welfare.

c. An administrative law judge with the qualifications identified in subrule 15.6(4) is unavailable to hear the case within a reasonable time.

d. The case involves significant policy issues of first impression that are inextricably intertwined with the factual issues presented.

e. The demeanor of the witnesses is likely to be dispositive in resolving the disputed factual issues.

f. Funds are unavailable to pay the costs of an administrative law judge and an intercouncil appeal.

g. The request was not timely filed.

h. The request is not consistent with a specified statute.

**15.6(3)** The council or its designee shall issue a written ruling specifying the grounds for its decision within 20 days after a request for an administrative law judge is filed. If the ruling is contingent upon the availability of an administrative law judge with the qualifications identified in subrule 15.6(4), the parties shall be notified at least 10 days prior to hearing if a qualified administrative law judge will not be available.

**15.6(4)** An administrative law judge assigned to act as presiding officer shall have the following technical expertise unless waived by the council: An administrative law judge shall have a law degree and shall not have been convicted of any crimes other than misdemeanor traffic violations.

**15.6(5)** Except as provided otherwise by another provision of law, all rulings by an administrative law judge acting as presiding officer are subject to appeal to the council. A party must seek any available intra-agency appeal in order to exhaust adequate administrative remedies.

**15.6(6)** Unless otherwise provided by law, the council when reviewing a proposed decision upon appeal shall have

the powers of and shall comply with the provisions of this chapter which apply to presiding officers.

**501—15.7(17A) Waiver of procedures.** Unless otherwise precluded by law, the parties in a contested case proceeding may waive any provision of this chapter. However, the council in its discretion may refuse to give effect to such a waiver when it deems the waiver to be inconsistent with the public interest.

**501—15.8(17A) Telephone proceedings.** The presiding officer may resolve preliminary procedural motions by telephone conference in which all parties have an opportunity to participate. Other telephone proceedings may be held with the consent of all parties. The presiding officer will determine the location of the parties and witnesses for telephone hearings. The convenience of the witnesses or parties, as well as the nature of the case, will be considered when location is chosen.

**501—15.9(17A) Disqualification.**

**15.9(1)** A presiding officer or other person shall withdraw from participation in the making of any proposed or final decision in a contested case if that person:

a. Has a personal bias or prejudice concerning a party or a representative of a party;

b. Has personally investigated, prosecuted or advocated in connection with that case, the specific controversy underlying that case, another pending factually related contested case, or a pending factually related controversy that may culminate in a contested case involving the same parties;

c. Is subject to the authority, direction or discretion of any person who has personally investigated, prosecuted or advocated in connection with that contested case, the specific controversy underlying that contested case, or a pending factually related contested case or controversy involving the same parties;

d. Has acted as counsel to any person who is a private party to that proceeding within the past two years;

e. Has a personal financial interest in the outcome of the case or any other significant personal interest that could be substantially affected by the outcome of the case;

f. Has a spouse or relative within the third degree of relationship that (1) is a party to the case, or an officer, director or trustee of a party; (2) is a lawyer in the case; (3) is known to have an interest that could be substantially affected by the outcome of the case; or (4) is likely to be a material witness in the case; or

g. Has any other legally sufficient cause to withdraw from participation in the decision making in that case.

**15.9(2)** The term "personally investigated" means taking affirmative steps to interview witnesses directly or to obtain documents or other information directly. The term "personally investigated" does not include general direction and supervision of assigned investigators, unsolicited receipt of information which is relayed to assigned investigators, review of another person's investigative work product in the course of determining whether there is probable cause to initiate a proceeding, or exposure to factual information while performing other council functions, including fact gathering for purposes other than investigation of the matter which culminates in a contested case. Factual information relevant to the merits of a contested case received by a person who later serves as presiding officer in that case shall be disclosed if required by Iowa Code section 17A.17(3) and subrules 15.9(3) and 15.23(9).

**15.9(3)** In a situation where a presiding officer or other person knows of information which might reasonably be

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deemed to be a basis for disqualification and decides voluntary withdrawal is unnecessary, that person shall submit the relevant information for the record by affidavit and shall provide for the record a statement of the reasons for the determination that withdrawal is unnecessary.

15.9(4) If a party asserts disqualification on any appropriate ground, including those listed in subrule 15.9(1), the party shall file a motion supported by an affidavit pursuant to 1998 Iowa Acts, chapter 1202, section 19(7). The motion must be filed as soon as practicable after the reason alleged in the motion becomes known to the party.

If, during the course of the hearing, a party first becomes aware of evidence of bias or other grounds for disqualification, the party may move for disqualification but must establish the grounds by the introduction of evidence into the record.

If the presiding officer determines that disqualification is appropriate, the presiding officer or other person shall withdraw. If the presiding officer determines that withdrawal is not required, the presiding officer shall enter an order to that effect. A party asserting disqualification may seek an interlocutory appeal under rule 15.25(17A) and seek a stay under rule 15.29(17A).

## 501—15.10(17A) Consolidation—severance.

15.10(1) Consolidation. The presiding officer may consolidate any or all matters at issue in two or more contested case proceedings where (a) the matters at issue involve common parties or common questions of fact or law; (b) consolidation would expedite and simplify consideration of the issues involved; and (c) consolidation would not adversely affect the rights of any of the parties to those proceedings.

15.10(2) Severance. The presiding officer may, for good cause shown, order any contested case proceedings or portions thereof severed.

## 501—15.11(17A) Pleadings.

15.11(1) Pleadings may be required by rule, by the notice of hearing, or by order of the presiding officer.

15.11(2) Petition. A petition in a contested case proceeding shall state in separately numbered paragraphs the following:

- a. The persons or entities on whose behalf the petition is filed;
- b. The particular provisions of statutes and rules involved;
- c. The relief demanded and the facts and law relied upon for such relief; and
- d. The name, address and telephone number of the petitioner and the petitioner's attorney, if any.

15.11(3) Answer. An answer shall be filed within 20 days of service of the petition unless otherwise ordered. A party may move to dismiss or apply for a more definite and detailed statement when appropriate.

An answer shall show on whose behalf it is filed and specifically admit, deny, or otherwise answer all material allegations of the pleading to which it responds. It shall state any facts deemed to show an affirmative defense and contain as many additional defenses as the pleader may claim.

An answer shall state the name, address and telephone number of the person filing the answer, the person or entity on whose behalf it is filed, and the attorney representing that person, if any.

Any allegation in the petition not denied in the answer is considered admitted. The presiding officer may refuse to consider any defense not raised in the answer which could have been raised on the basis of facts known when the answer was filed if any party would be prejudiced.

15.11(4) Amendment. Any notice of hearing, petition, or other charging document may be amended before a responsive pleading has been filed. Amendments to pleadings after a responsive pleading has been filed and to an answer may be allowed with the consent of the other parties or in the discretion of the presiding officer who may impose terms or grant a continuance.

## 501—15.12(17A) Service and filing of pleadings and other papers.

15.12(1) When service required. Except where otherwise provided by law, every pleading, motion, document, or other paper filed in a contested case proceeding and every paper relating to discovery in such a proceeding shall be served upon each of the parties of record to the proceeding, including the person designated as advocate or prosecutor for the state or the council, simultaneously with their filing. Except for the original notice of hearing and an application for rehearing as provided in Iowa Code section 17A.16(2), the party filing a document is responsible for service on all parties.

15.12(2) Service—how made. Service upon a party represented by an attorney shall be made upon the attorney unless otherwise ordered. Service is made by delivery or by mailing a copy to the person's last-known address. Service by mail is complete upon mailing, except where otherwise specifically provided by statute, rule, or order.

15.12(3) Filing—when required. After the notice of hearing, all pleadings, motions, documents or other papers in a contested case proceeding shall be filed with the Iowa Law Enforcement Academy Council, Attn: Contested Case Coordinator, P.O. Box 130, Johnston, Iowa 50131. All pleadings, motions, documents or other papers that are required to be served upon a party shall be filed simultaneously with the Iowa law enforcement academy council.

15.12(4) Filing—when made. Except where otherwise provided by law, a document is deemed filed at the time it is delivered to the academy, delivered to an established courier service for immediate delivery to the academy, or mailed by first-class mail or state interoffice mail to the academy, so long as there is proof of mailing.

15.12(5) Proof of mailing. Proof of mailing includes either: a legible United States Postal Service postmark on the envelope, a certificate of service, a notarized affidavit, or a certification in substantially the following form:

I certify under penalty of perjury and pursuant to the laws of Iowa that, on (date of mailing), I mailed copies of (describe document) addressed to the Iowa Law Enforcement Academy Council, Attn: Contested Case Coordinator, P.O. Box 130, Johnston, Iowa 50131, and to the names and addresses of the parties listed below by depositing the same in (a United States post office mailbox with correct postage properly affixed or state interoffice mail).

(Date)

(Signature)

## 501—15.13(17A) Discovery.

15.13(1) Discovery procedures applicable in civil actions are applicable in contested cases. Unless lengthened or shortened by these rules or by order of the presiding officer, time periods for compliance with discovery shall be as provided in the Iowa Rules of Civil Procedure.

15.13(2) Any motion relating to discovery shall allege that the moving party has previously made a good-faith attempt to resolve the discovery issues involved with the opposing party. Motions in regard to discovery shall be ruled upon by the presiding officer. Opposing parties shall be afforded the opportunity to respond within ten days of the fil-

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ing of the motion unless the time is shortened as provided in subrule 15.13(1). The presiding officer may rule on the basis of the written motion and any response, or may order argument on the motion.

15.13(3) Evidence obtained in discovery may be used in the contested case proceeding if that evidence would otherwise be admissible in that proceeding.

**501—15.14(17A) Subpoenas.****15.14(1) Issuance.**

a. A council subpoena shall be issued to a party on request. Such a request must be in writing. In the absence of good cause for permitting later action, a request for a subpoena must be received at least three days before the scheduled hearing. The request shall include the name, address, and telephone number of the requesting party.

b. Except to the extent otherwise provided by law, parties are responsible for service of their own subpoenas and payment of witness fees and mileage expenses.

15.14(2) Motion to quash or modify. The presiding officer may quash or modify a subpoena for any lawful reason upon motion in accordance with the Iowa Rules of Civil Procedure. A motion to quash or modify a subpoena shall be set for argument promptly.

**501—15.15(17A) Motions.**

15.15(1) No technical form for motions is required. However, prehearing motions must be in writing, state the grounds for relief, and state the relief sought.

15.15(2) Any party may file a written response to a motion within ten days after the motion is served, unless the time period is extended or shortened by rules of the council or the presiding officer. The presiding officer may consider a failure to respond within the required time period in ruling on a motion.

15.15(3) The presiding officer may schedule oral argument on any motion.

15.15(4) Motions pertaining to the hearing, except motions for summary judgment, must be filed and served at least ten days prior to the date of hearing unless there is good cause for permitting later action or the time for such action is lengthened or shortened by rule of the council or an order of the presiding officer.

15.15(5) Motions for summary judgment. Motions for summary judgment shall comply with the requirements of Iowa Rule of Civil Procedure 237 and shall be subject to disposition according to the requirements of that rule to the extent such requirements are not inconsistent with the provisions of this rule or any other provision of law governing the procedure in contested cases.

Motions for summary judgment must be filed and served at least 45 days prior to the scheduled hearing date, or other time period determined by the presiding officer. Any party resisting the motion shall file and serve a resistance within 15 days, unless otherwise ordered by the presiding officer, from the date a copy of the motion was served. The time fixed for hearing or nonoral submission shall be not less than 20 days after the filing of the motion, unless a shorter time is ordered by the presiding officer. A summary judgment order rendered on all issues in a contested case is subject to rehearing pursuant to 15.28(17A) and appeal pursuant to 15.27(17A).

**501—15.16(17A) Prehearing conference.**

15.16(1) Any party may request a prehearing conference. A written request for prehearing conference or an order for prehearing conference on the presiding officer's own motion shall be filed not less than seven days prior to the hearing

date. A prehearing conference shall be scheduled not less than three business days prior to the hearing date.

Written notice of the prehearing conference shall be given by the academy to all parties. For good cause the presiding officer may permit variances from this rule.

15.16(2) Each party shall bring to the prehearing conference:

a. A final list of the witnesses who the party anticipates will testify at hearing. Witnesses not listed may be excluded from testifying unless there was good cause for the failure to include their names; and

b. A final list of exhibits which the party anticipates will be introduced at hearing. Exhibits other than rebuttal exhibits that are not listed may be excluded from admission into evidence unless there was good cause for the failure to include them.

c. Witness or exhibit lists may be amended subsequent to the prehearing conference within the time limits established by the presiding officer at the prehearing conference. Any such amendments must be served on all parties.

15.16(3) In addition to the requirements of subrule 15.16(2), the parties at a prehearing conference may:

a. Enter into stipulations of law or fact;

b. Enter into stipulations on the admissibility of exhibits;

c. Identify matters which the parties intend to request be officially noticed;

d. Enter into stipulations for waiver of any provision of law; and

e. Consider any additional matters which will expedite the hearing.

15.16(4) Prehearing conferences shall be conducted by telephone unless otherwise ordered. Parties shall exchange and receive witness and exhibit lists in advance of a telephone prehearing conference.

**501—15.17(17A) Continuances.** Unless otherwise provided, applications for continuances shall be made to the presiding officer.

15.17(1) A written application for a continuance shall:

a. Be made at the earliest possible time and no less than seven days before the hearing except in case of unanticipated emergencies;

b. State the specific reasons for the request; and

c. Be signed by the requesting party or the party's representative.

An oral application for a continuance may be made if the presiding officer waives the requirement for a written motion. However, a party making such an oral application for a continuance must confirm that request by written application within five days after the oral request unless that requirement is waived by the presiding officer. No application for continuance shall be made or granted without notice to all parties except in an emergency where notice is not feasible. The council may waive notice of such requests for a particular case or an entire class of cases.

15.17(2) In determining whether to grant a continuance, the presiding officer may consider:

a. Prior continuances;

b. The interests of all parties;

c. The likelihood of informal settlement;

d. The existence of an emergency;

e. Any objection;

f. Any applicable time requirements;

g. The existence of a conflict in the schedules of counsel, parties, or witnesses;

h. The timeliness of the request; and

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## i. Other relevant factors.

The presiding officer may require documentation of any grounds for continuance.

**501—15.18(17A) Withdrawals.** A party requesting a contested case proceeding may withdraw that request prior to the hearing only in accordance with council rules. Unless otherwise provided, a withdrawal shall be with prejudice.

**501—15.19(17A) Intervention.**

**15.19(1) Motion.** A motion for leave to intervene in a contested case proceeding shall state the grounds for the proposed intervention, the position and interest of the proposed intervenor, and the possible impact of intervention on the proceeding. A proposed answer or petition in intervention shall be attached to the motion. Any party may file a response within 14 days of service of the motion to intervene unless the time period is extended or shortened by the presiding officer.

**15.19(2) When filed.** Motion for leave to intervene shall be filed as early in the proceeding as possible to avoid adverse impact on existing parties or the conduct of the proceeding. Unless otherwise ordered, a motion for leave to intervene shall be filed before the prehearing conference, if any, or at least 20 days before the date scheduled for hearing. Any later motion must contain a statement of good cause for the failure to file in a timely manner. Unless inequitable or unjust, an intervenor shall be bound by any agreement, arrangement, or other matter previously raised in the case. Requests by untimely intervenors for continuances which would delay the proceeding will ordinarily be denied.

**15.19(3) Grounds for intervention.** The movant shall demonstrate that (a) intervention would not unduly prolong the proceedings or otherwise prejudice the rights of existing parties; (b) the movant is likely to be aggrieved or adversely affected by a final order in the proceeding; and (c) the interests of the movant are not adequately represented by existing parties.

**15.19(4) Effect of intervention.** If appropriate, the presiding officer may order consolidation of the petitions and briefs of different parties whose interests are aligned with each other and limit the number of representatives allowed to participate actively in the proceedings. A person granted leave to intervene is a party to the proceeding. The order granting intervention may restrict the issues that may be raised by the intervenor or otherwise condition the intervenor's participation in the proceeding.

**501—15.20(17A) Hearing procedures.**

**15.20(1)** The presiding officer presides at the hearing, and may rule on motions, require briefs, issue a proposed decision, and issue such orders and rulings as will ensure the orderly conduct of the proceedings.

**15.20(2)** All objections shall be timely made and stated on the record.

**15.20(3)** Parties have the right to participate or to be represented in all hearings or prehearing conferences related to their case. Partnerships, corporations, or associations may be represented by any member, officer, director, or duly authorized agent. Any party may be represented by an attorney or another person authorized by law.

**15.20(4)** Subject to terms and conditions prescribed by the presiding officer, parties have the right to introduce evidence on issues of material fact, cross-examine witnesses present at the hearing as necessary for a full and true disclosure of the facts, present evidence in rebuttal, and submit briefs and engage in oral argument.

**15.20(5)** The presiding officer shall maintain the decorum of the hearing and may refuse to admit or may expel anyone whose conduct is disorderly.

**15.20(6)** Witnesses may be sequestered during the hearing.

**15.20(7)** The presiding officer shall conduct the hearing in the following manner:

a. The presiding officer shall give an opening statement briefly describing the nature of the proceedings;

b. The parties shall be given an opportunity to present opening statements;

c. Parties shall present their cases in the sequence determined by the presiding officer;

d. Each witness shall be sworn or affirmed by the presiding officer or the court reporter, and be subject to examination and cross-examination. The presiding officer may limit questioning in a manner consistent with law;

e. When all parties and witnesses have been heard, parties may be given the opportunity to present final arguments.

**501—15.21(17A) Evidence.**

**15.21(1)** The presiding officer shall rule on admissibility of evidence and may, where appropriate, take official notice of facts in accordance with all applicable requirements of law.

**15.21(2)** Stipulation of facts is encouraged. The presiding officer may make a decision based on stipulated facts.

**15.21(3)** Evidence in the proceeding shall be confined to the issues as to which the parties received notice prior to the hearing unless the parties waive their right to such notice or the presiding officer determines that good cause justifies expansion of the issues. If the presiding officer decides to admit evidence on issues outside the scope of the notice over the objection of a party who did not have actual notice of those issues, that party, upon timely request, shall receive a continuance sufficient to amend pleadings and to prepare on the additional issue.

**15.21(4)** The party seeking admission of an exhibit must provide opposing parties with an opportunity to examine the exhibit prior to the ruling on its admissibility. Copies of documents should normally be provided to opposing parties.

All exhibits admitted into evidence shall be appropriately marked and be made part of the record.

**15.21(5)** Any party may object to specific evidence or may request limits on the scope of any examination or cross-examination. Such an objection shall be accompanied by a brief statement of the grounds upon which it is based. The objection, the ruling on the objection, and the reasons for the ruling shall be noted in the record. The presiding officer may rule on the objection at the time it is made or may reserve a ruling until the written decision.

**15.21(6)** Whenever evidence is ruled inadmissible, the party offering that evidence may submit an offer of proof on the record. The party making the offer of proof for excluded oral testimony shall briefly summarize the testimony or, with permission of the presiding officer, present the testimony. If the excluded evidence consists of a document or exhibit, it shall be marked as part of an offer of proof and inserted in the record.

**501—15.22(17A) Default.**

**15.22(1)** If a party fails to appear or participate in a contested case proceeding after proper service of notice, the presiding officer may, if no adjournment is granted, enter a default decision or proceed with the hearing and render a decision in the absence of the party.

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15.22(2) Where appropriate and not contrary to law, any party may move for default against a party who has requested the contested case proceeding and has failed to file a required pleading or has failed to appear after proper service.

15.22(3) Default decisions or decisions rendered on the merits after a party has failed to appear or participate in a contested case proceeding become final council action unless, within 15 days after the date of notification or mailing of the decision, a motion to vacate is filed and served on all parties or an appeal of a decision on the merits is timely initiated within the time provided by rule 15.27(17A). A motion to vacate must state all facts relied upon by the moving party which establish that good cause existed for that party's failure to appear or participate at the contested case proceeding. Each fact so stated must be substantiated by at least one sworn affidavit of a person with personal knowledge of each such fact, which affidavit(s) must be attached to the motion.

15.22(4) The time for further appeal of a decision for which a timely motion to vacate has been filed is stayed pending a decision on the motion to vacate.

15.22(5) Properly substantiated and timely filed motions to vacate shall be granted only for good cause shown. The burden of proof as to good cause is on the moving party. Adverse parties shall have ten days to respond to a motion to vacate. Adverse parties shall be allowed to conduct discovery as to the issue of good cause and to present evidence on the issue prior to a decision on the motion, if a request to do so is included in that party's response.

15.22(6) "Good cause" for purposes of this rule shall have the same meaning as "good cause" for setting aside a default judgment under Iowa Rule of Civil Procedure 236.

15.22(7) A decision denying a motion to vacate is subject to further appeal within the time limit allowed for further appeal of a decision on the merits in the contested case proceeding. A decision granting a motion to vacate is subject to interlocutory appeal by the adverse party pursuant to rule 15.25(17A).

15.22(8) If a motion to vacate is granted and no timely interlocutory appeal has been taken, the presiding officer shall issue another notice of hearing and the contested case shall proceed accordingly.

15.22(9) A default decision may award any relief consistent with the request for relief made in the petition and embraced in its issues.

15.22(10) A default decision may provide either that the default decision is to be stayed pending a timely motion to vacate or that the default decision is to take effect immediately, subject to a request for stay under rule 15.29(17A).

## 501—15.23(17A) Ex parte communication.

15.23(1) Prohibited communications. Unless required for the disposition of ex parte matters specifically authorized by statute, following issuance of the notice of hearing, there shall be no communication, directly or indirectly, between the presiding officer and any party or representative of any party or any other person with a direct or indirect interest in such case in connection with any issue of fact or law in the case except upon notice and opportunity for all parties to participate. This does not prohibit persons jointly assigned such tasks from communicating with each other. Nothing in this provision is intended to preclude the presiding officer from communicating with members of the council or seeking the advice or help of persons other than those with a personal interest in, or those engaged in personally investigating as defined in subrule 15.9(2), prosecuting, or advocating in, either the case under consideration or a pending factually related case involving the same parties as long as those persons do

not directly or indirectly communicate to the presiding officer any ex parte communications they have received of a type that the presiding officer would be prohibited from receiving or that furnish, augment, diminish, or modify the evidence in the record.

15.23(2) Prohibitions on ex parte communications commence with the issuance of the notice of hearing in a contested case and continue for as long as the case is pending.

15.23(3) Written, oral or other forms of communication are "ex parte" if made without notice and opportunity for all parties to participate.

15.23(4) To avoid prohibited ex parte communications, notice must be given in a manner reasonably calculated to give all parties a fair opportunity to participate. Notice of written communications shall be provided in compliance with rule 15.12(17A) and may be supplemented by telephone, facsimile, electronic mail or other means of notification. Where permitted, oral communications may be initiated through conference telephone call including all parties or their representatives.

15.23(5) Persons who jointly act as presiding officer in a pending contested case may communicate with each other without notice or opportunity for parties to participate.

15.23(6) The executive director or other persons may be present in deliberations or otherwise advise the presiding officer without notice or opportunity for parties to participate as long as they are not disqualified from participating in the making of a proposed or final decision under any provision of law and they comply with subrule 15.23(1).

15.23(7) Communications with the presiding officer involving uncontested scheduling or procedural matters do not require notice or opportunity for parties to participate. Parties should notify other parties prior to initiating such contact with the presiding officer when feasible, and shall notify other parties when seeking to continue hearings or other deadlines pursuant to rule 15.17(17A).

15.23(8) Disclosure of prohibited communications. A presiding officer who receives a prohibited ex parte communication during the pendency of a contested case must initially determine if the effect of the communication is so prejudicial that the presiding officer should be disqualified. If the presiding officer determines that disqualification is warranted, a copy of any prohibited written communication, all written responses to the communication, a written summary stating the substance of any prohibited oral or other communication not available in written form for disclosure, all responses made, and the identity of each person from whom the presiding officer received a prohibited ex parte communication shall be submitted for inclusion in the record under seal by protective order. If the presiding officer determines that disqualification is not warranted, such documents shall be submitted for inclusion in the record and served on all parties. Any party desiring to rebut the prohibited communication must be allowed the opportunity to do so upon written request filed within ten days after notice of the communication.

15.23(9) Promptly after being assigned to serve as presiding officer at any stage in a contested case proceeding, a presiding officer shall disclose to all parties material factual information received through ex parte communication prior to such assignment unless the factual information has already been or shortly will be disclosed pursuant to Iowa Code section 17A.13(2) or through discovery. Factual information contained in an investigative report or similar document need not be separately disclosed by the presiding officer as

## LAW ENFORCEMENT ACADEMY{501}(cont'd)

long as such documents have been or will shortly be provided to the parties.

**15.23(10)** The presiding officer may render a proposed or final decision imposing appropriate sanctions for violations of this rule including default, a decision against the offending party, censure, or suspension or revocation of the privilege to practice before the council. Violation of ex parte communication prohibitions by academy personnel shall be reported to the director for possible sanctions including censure, suspension, dismissal, or other disciplinary action.

**501—15.24(17A) Recording costs.** Upon request, the academy shall provide a copy of the whole or any portion of the record at cost. The cost of preparing a copy of the record or of transcribing the hearing record shall be paid by the requesting party. Parties who request that a hearing be recorded by certified shorthand reporters rather than by electronic means shall bear the cost of that recordation, unless otherwise provided by law.

**501—15.25(17A) Interlocutory appeals.** Upon written request of a party or on its own motion, the council may review an interlocutory order of the presiding officer. In determining whether to do so, the council shall weigh the extent to which its granting the interlocutory appeal would expedite final resolution of the case and the extent to which review of that interlocutory order by the council at the time it reviews the proposed decision of the presiding officer would provide an adequate remedy. Any request for interlocutory review must be filed within 14 days (or other time period designated by the council) of issuance of the challenged order, but no later than the time for compliance with the order or the date of hearing, whichever is first.

**501—15.26(17A) Final decision.**

**15.26(1)** When the council presides over the reception of evidence at the hearing, its decision is a final decision.

**15.26(2)** When the Iowa law enforcement academy council does not preside at the reception of evidence, the presiding officer shall make a proposed decision. The proposed decision becomes the final decision of the council without further proceedings unless there is an appeal to, or review on motion of, the Iowa law enforcement academy council within the time provided in rule 15.27(17A).

**501—15.27(17A) Appeals and review.**

**15.27(1)** Appeal by party. Any adversely affected party may appeal a proposed decision to the council within 30 days after issuance of the proposed decision.

**15.27(2)** Review. The council may initiate review of a proposed decision on its own motion at any time within 30 days following the issuance of such a decision.

**15.27(3)** Notice of appeal. An appeal of a proposed decision is initiated by filing a timely notice of appeal with the Iowa law enforcement academy council. The notice of appeal must be signed by the appealing party or a representative of that party and contain a certificate of service. The notice shall specify:

- a. The parties initiating the appeal;
- b. The proposed decision or order appealed from;
- c. The specific findings or conclusions to which exception is taken and any other exceptions to the decision or order;
- d. The relief sought;
- e. The grounds for relief.

**15.27(4)** Requests to present additional evidence. A party may request the taking of additional evidence only by establishing that the evidence is material, that good cause ex-

isted for the failure to present the evidence at the hearing, and that the party has not waived the right to present the evidence. A written request to present additional evidence must be filed with the notice of appeal or, by a nonappealing party, within 14 days (or other time period designated by the council) of service of the notice of appeal. The council may remand a case to the presiding officer for further hearing or may itself preside at the taking of additional evidence.

**15.27(5)** Scheduling. The Iowa law enforcement academy council shall issue a schedule for consideration of the appeal.

**15.27(6)** Briefs and arguments. Unless otherwise ordered, within 20 days (or other time period designated by the council) of the notice of appeal or order for review, each appealing party may file exceptions and briefs. Within 20 days thereafter (or other time period designated by the council), any party may file a responsive brief. Briefs shall cite any applicable legal authority and specify relevant portions of the record in that proceeding. Written requests to present oral argument shall be filed with the briefs.

The council may resolve the appeal on the briefs or provide an opportunity for oral argument. The council may shorten or extend the briefing period as appropriate.

**501—15.28(17A) Applications for rehearing.**

**15.28(1)** By whom filed. Any party to a contested case proceeding may file an application for rehearing from a final order.

**15.28(2)** Content of application. The application for rehearing shall state on whose behalf it is filed, the specific grounds for rehearing, and the relief sought. In addition, the application shall state whether the applicant desires reconsideration of all or part of the council decision on the existing record and whether, on the basis of the grounds enumerated in subrule 15.27(4), the applicant requests an opportunity to submit additional evidence.

**15.28(3)** Time of filing. The application shall be filed with the Iowa law enforcement academy council within 20 days after issuance of the final decision.

**15.28(4)** Notice to other parties. A copy of the application shall be timely mailed by the applicant to all parties of record not joining therein. If the application does not contain a certificate of service, the Iowa law enforcement academy council shall serve copies on all parties.

**15.28(5)** Disposition. Any application for a rehearing shall be deemed denied unless the council grants the application within 20 days after its filing.

**501—15.29(17A) Stays of council actions.**

**15.29(1)** When available.

a. Any party to a contested case proceeding may petition the council for a stay of an order issued in that proceeding or for other temporary remedies, pending review by the council. The petition shall be filed with the notice of appeal and shall state the reasons justifying a stay or other temporary remedy. The council may rule on the stay or authorize the presiding officer to do so.

b. Any party to a contested case proceeding may petition the council for a stay or other temporary remedies pending judicial review of all or part of that proceeding. The petition shall state the reasons justifying a stay or other temporary remedy.

**15.29(2)** When granted. In determining whether to grant a stay, the presiding officer or the council shall consider the factors listed in 1998 Iowa Acts, chapter 1202, section 23(5c).

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**15.29(3) Vacation.** A stay may be vacated by the issuing authority upon application of the council or any other party.

**501—15.30(17A) No factual dispute contested cases.** If the parties agree that no dispute of material fact exists as to a matter that would be a contested case if such a dispute of fact existed, the parties may present all relevant admissible evidence either by stipulation or otherwise as agreed by the parties, without necessity for the production of evidence at an evidentiary hearing. If such agreement is reached, a jointly submitted schedule detailing the method and timetable for submission of the record, briefs and oral argument should be submitted to the presiding officer for approval as soon as practicable. If the parties cannot agree, any party may file and serve a motion for summary judgment pursuant to the rules governing such motions.

**501—15.31(17A) Emergency adjudicative proceedings.**

**15.31(1) Necessary emergency action.** To the extent necessary to prevent or avoid immediate danger to the public health, safety, or welfare and, consistent with the Constitution and other provisions of law, the council may issue a written order in compliance with Iowa Code section 17A.18 to suspend a license in whole or in part, order the cessation of any continuing activity, order affirmative action, or take other action within the jurisdiction of the council by emergency adjudicative order. Before issuing an emergency adjudicative order the council shall consider factors including, but not limited to, the following:

- a. Whether there has been a sufficient factual investigation to ensure that the council is proceeding on the basis of reliable information;
- b. Whether the specific circumstances which pose immediate danger to the public health, safety or welfare have been identified and determined to be continuing;
- c. Whether the person required to comply with the emergency adjudicative order may continue to engage in other activities without posing immediate danger to the public health, safety or welfare;
- d. Whether imposition of monitoring requirements or other interim safeguards would be sufficient to protect the public health, safety or welfare; and
- e. Whether the specific action contemplated by the council is necessary to avoid the immediate danger.

**15.31(2) Issuance of order.**

a. An emergency adjudicative order shall contain findings of fact, conclusions of law, and policy reasons to justify the determination of an immediate danger in the council's decision to take immediate action.

b. The written emergency adjudicative order shall be immediately delivered to persons who are required to comply with the order by utilizing one or more of the following procedures:

- (1) Personal delivery;
- (2) Certified mail, return receipt requested, to the last address on file with the council;
- (3) Certified mail to the last address on file with the council;
- (4) First-class mail to the last address on file with the council; or
- (5) Fax. Fax may be used as the sole method of delivery if the person required to comply with the order has filed a written request that council orders be sent by fax and has provided a fax number for that purpose.

c. To the degree practicable, the council shall select the procedure for providing written notice that best ensures prompt, reliable delivery.

**15.31(3) Oral notice.** Unless the written emergency adjudicative order is provided by personal delivery on the same day that the order issues, the council shall make reasonable immediate efforts to contact by telephone the persons who are required to comply with the order.

**15.31(4) Completion of proceedings.** After the issuance of an emergency adjudicative order, the council shall proceed as quickly as feasible to complete any proceedings that would be required if the matter did not involve an immediate danger.

Issuance of a written emergency adjudicative order shall include notification of the date on which council proceedings are scheduled for completion. After issuance of an emergency adjudicative order, continuance of further council proceedings to a later date will be granted only in compelling circumstances upon application in writing.

These rules are intended to implement Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202, and Iowa Code chapter 80B.

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**LOTTERY DIVISION[705]****Notice of Intended Action**

Twenty-five interested persons, a governmental subdivision, an agency or association of 25 or more persons may demand an oral presentation hereon as provided in Iowa Code section 17A.4(1)"b."

Notice is also given to the public that the Administrative Rules Review Committee may, on its own motion or on written request by any individual or group, review this proposed action under section 17A.8(6) at a regular or special meeting where the public or interested persons may be heard.

Pursuant to the authority of Iowa Code paragraph 17A.3(1)"b," the Lottery Division proposes to amend Chapter 1, "General Operation of the Lottery," Chapter 2, "Licensing," Chapter 6, "Contested Cases," and Chapter 13, "Computerized Lottery Games—General Rules," rescind Chapter 7, "Petitions for Rule Making and Petitions for Declaratory Rulings," and adopt a new Chapter 7, "Declaratory Orders," and Chapter 14, "Petitions for Rule Making," Iowa Administrative Code.

These amendments and additions revise the Lottery's rules by allowing prize winners to elect a cash payment option after winning a prize that is paid over a period of 10 years or more, requiring bonds for retailers, contested case proceedings, rule making, petitions for rule making, and declaratory orders.

The majority of these amendments address changes mandated by the amendments to the Iowa Administrative Procedure Act. See 1998 Iowa Acts, chapter 1202. A task force from the Attorney General's Office drafted amendments to the Uniform Rules on Agency Procedure to implement the amendments to the Iowa Administrative Procedure Act. The Lottery's proposed amendments to its rules are based on the amendments of the Attorney General's task force, with some omissions and modifications to fit the Lottery's needs. The task force's amendments are available at the State Law Library, Capitol Building, Des Moines, Iowa, or on the Attorney General's web site at <http://www.state.ia.us/government/ag/deptdir.htm>.

With these revisions, the Lottery's rules will be in compliance with 1998 Iowa Acts, chapter 1202. The major changes governing the rule-making process in chapter 1202 that are to be effective July 1, 1999, are as follows:

## LOTTERY DIVISION[705](cont'd)

- In Chapter 2, the Lottery is amending its rules to implement a policy regarding bonds for retailers with credit problems or no credit history.

- In Chapter 6, the Lottery has revised its contested case rules to be consistent with the changes in the law. The amendments provide for the selection of the presiding officer at hearings, ex parte communications with presiding officers, motion practice, default orders, emergency adjudicative proceedings, and stay orders.

- In Chapter 7, the Lottery has revised its rules governing declaratory orders to be consistent with the changes in the law. The purpose is the same, but requirements are more specific than in current law. Rules are added to provide for petitions for intervention.

- In Chapter 14, the Lottery has included rules governing rule making, the regulatory analysis of a rule and the requirements for economic impact statements. The rules also refer to the requirements for fiscal notes required by the Iowa Code. The rule-making provisions also provide for rule reviews to determine whether a rule should be repealed or amended or a new rule adopted. The rules require the Lottery to make this review if such a review has not been conducted in the last five years. The rules identify the various members of government or the public that have the right to make this request.

Additionally, in Item 1, the Lottery is amending its rules to accommodate a change in federal tax law that allows prize winners to elect to take a cash payment of a prize 60 days after the prize winner becomes eligible to receive the prize. The rule also accommodates a change in federal tax law that allows prior winners to ask for a cash payment of their prize as well.

In Item 2, the Lottery is setting forth a rule governing bonding requirements for retailers in accordance with Iowa Code section 99E.16(4).

In Item 16, the Lottery is adding a new rule to address concerns regarding the use of the prize fund to support special promotions and the transfer of prize fund moneys to a successor or different on-line game.

The Lottery will hold a public hearing on these rules on April 15, 1999, at 9 a.m. at 2015 Grand Avenue, Des Moines, Iowa, to take public comments on these amendments.

Consideration will be given to all written data, views, and arguments thereto received by the Iowa Lottery, Attention Ken Brickman, Assistant Commissioner, 2015 Grand Avenue, Des Moines, Iowa 50312, on or before April 13, 1999.

These amendments are intended to implement Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202, and Iowa Code chapter 99E.

The following amendments are proposed.

ITEM 1. Adopt **new** rule 705—1.29(99E) as follows:

**705—1.29(99E) Prize payment for prizes paid over a term exceeding ten years.**

**1.29(1)** A prize winner who wins a prize that is payable over a term exceeding 10 years may, not later than 60 days after the player became entitled to the prize, elect to have the prize paid in cash or by annuity consistent with 26 U.S.C. §451. If the payment election is not made by the prize winner at the time of purchase or is not made within 60 days after the prize winner becomes entitled to the prize, then the prize shall be paid as an annuity prize. An election for an annuity payment made by a prize winner before the ticket purchase or by system default or design may be changed to a cash payment at the election of the prize winner until the expiration of 60 days after the prize winner becomes entitled to the prize.

The election to take the cash payment may be made at the earlier of the following dates:

- a. The time of the prize claim; or
- b. Within 60 days after the prize winner becomes entitled to the prize.

An election made after the prize winner becomes entitled to the prize is final and cannot be revoked, withdrawn or otherwise changed.

**1.29(2)** In the event there is more than one prize winner for a prize paid over a period exceeding 10 years, the shares of the prize shall be determined by dividing the cash available in the prize pool equally among all the winners of the prize. Winners who elect a cash payment shall be paid their share in a single cash payment. The annuitized option prize shall be determined by multiplying a winner's share of the prize pool by the annuity factor used by the lottery. The lottery's annuity factor is determined by the best price obtained through a competitive bid of qualified, preapproved brokers or insurance companies made after it is determined that the prize is to be paid as an annuity prize or after the expiration of 60 days after the prize winner becomes entitled to the prize.

**1.29(3)** The lottery shall not be responsible or liable for changes in the advertised or estimated annuity prize amount and the actual amount of the prize value purchased from the time the player becomes eligible for the prize and the time the prize winner claims the prize.

**1.29(4)** A prize winner who won a prize before the effective date of 26 U.S.C. §451, which prize is being paid out over a period greater than 10 years, may elect to be paid in cash consistent with 26 U.S.C. §451 and 26 U.S.C. §5301. A prize winner qualifying for this election may make the election on or after July 1, 1999, until December 31, 2000. In the event a prize winner makes such an election, the lottery shall distribute cash in amounts equal to the present value of that portion of the future lottery payments due to the prize winner that the lottery can obtain by either selling financial instruments held by the lottery to fund the prize or by requesting the payment of the present value of an annuity held by the lottery and used to fund the prize winner's prize.

- a. A prize winner's election to take cash is final and cannot be revoked, withdrawn or otherwise changed.

- b. The lottery shall not be responsible or liable for changes in the present value of amounts payable to a prize winner after the election is made due to changes in the price of qualified securities or financial instruments used to fund the prize.

- c. A prize winner making this election will be required to make the election in writing on a claim form approved by the lottery.

- d. A prize winner making this election will be solely responsible for the tax consequences of this election.

This rule is intended to implement Iowa Code sections 99E.9(3), 99E.9(3)"e," and 99E.19(2).

ITEM 2. Adopt **new** rule 705—2.16(99E) as follows:

**705—2.16(99E) Financial responsibility.** The lottery shall use the following guidelines to determine financial responsibility for a retailer seeking a license to sell lottery products.

**2.16(1)** Sole proprietorship. If the license applicant is a sole proprietor, during the past two years, the applicant may have up to four accounts past due and no accounts over 90 days past due. The lottery will not require a bond with this credit history.

**2.16(2)** Partnership. If the license applicant is a partnership, 50 percent of the partners must meet the credit guide-

## LOTTERY DIVISION[705](cont'd)

lines listed in subrule 2.16(1). If the requirements of subrule 2.16(1) are satisfied, the lottery will not require a bond with this credit history.

**2.16(3) Fraternal or civic associations.** If the license applicant is a fraternal association, civic organization or other nonprofit entity, the applicant must meet the credit guidelines set forth in subrule 2.16(1). If the requirements of subrule 2.16(1) are satisfied, the lottery will not require a bond with this credit history. If the fraternal or civic association or other nonprofit entity has no credit history or the credit history is incomplete in the sole discretion of the lottery, then the officers of the fraternal or civic association or other nonprofit entity must meet the requirements of subrule 2.16(1). If the requirements of subrule 2.16(1) are satisfied, the lottery will not require a bond with this credit history.

**2.16(4) Corporations and limited liability companies—**two years or more. If the license applicant is a corporation or a limited liability company and the corporation or the limited liability company has been in existence for more than two years from the date of the application, the license applicant must meet all of the following financial responsibility guidelines:

- a. The license applicant is paying 60 percent of its suppliers on time or within terms; and
- b. The license applicant must have a credit risk class provided by a financial and credit reporting entity of less than 5 or an equivalent rating.

If the corporation or the limited liability company meets the guidelines described in this rule, the lottery will not require a bond from the license applicant.

**2.16(5) Corporations and limited liability companies—**less than two years. If a corporation has been in existence for less than two years from the date of the application, the lottery will review the credit history of the corporate officers who hold 10 percent or more of the stock of the corporation. If a limited liability company has been in existence for less than two years, the lottery will review the credit history of the members of a limited liability company who have contributed 10 percent or more to the capital of the limited liability company. Fifty percent or more of the corporate officers or members of the limited liability company must meet the credit guidelines set forth in subrule 2.16(1). If the corporate officers or the members of the limited liability company meet the requirements set forth in subrule 2.16(1), the lottery will not require the corporation or the limited liability company to obtain a bond.

**2.16(6) Bonding requirements.** With respect to any license applicant whose credit history does not meet the guidelines described in subrules 2.16(1) and 2.16(4), the applicant will be required to obtain a bond from a surety company authorized to do business in Iowa or offer a cash bond in the amounts generally described herein. The amount of the bond will vary depending on the type of lottery products sold by the license applicant, the sales history of the retail location or the average volume of sales of lottery products at the location, or a combination of the above factors. The following minimum amounts will be required:

- a. Sale of pull-tab tickets only \$500
- b. Sale of pull-tab and instant tickets only \$1,500
- c. Sale of all products including on-line games \$2,500

**2.16(7) Holding period for bond.** The lottery will hold the bond provided by license applicant for a minimum time period of one year. Thereafter, the lottery will review the credit history of the licensed retailer. If the retailer's account history shows no delinquent payments, the lottery will release the bond.

This rule is intended to implement Iowa Code section 99E.16(4).

ITEM 3. Amend rules 705—6.1(17A) and 705—6.2(17A) as follows:

**705—6.1(17A) Scope and applicability.** This chapter applies to contested case proceedings related to lottery licenses, lottery licenses, *disputes regarding tickets and ticket validation and vendor disputes.*

**705—6.2(17A) Definitions.** Except where otherwise specifically defined by law:

“Contested case” means a proceeding defined by Iowa Code subsection 17A.2(2) and includes any matter defined as a no factual dispute contested case under 1998 Iowa Acts, chapter 1202, section 14.

“Hearing board” means the board designated to resolve license disputes pursuant to Iowa Code subsection 99E.17(2).

“Issuance” means the date of mailing of a decision or order or date of delivery if service is by other means unless another date is specified in the order.

“Party” means each person or agency named or admitted as a party or properly seeking and entitled as of right to be admitted as a party.

“Presiding officer” means the administrative law judge.

“Proposed decision” means the presiding officer's recommended findings of fact, conclusions of law, decision, and order in a contested case in which the hearing board did not preside.

ITEM 4. Amend subrule 6.3(1) as follows:

**6.3(1)** Time shall be computed as provided in Iowa Code subsection 4.1(~~22~~)(34).

ITEM 5. Amend rule 705—6.5(17A) as follows:

**705—6.5(17A) Notice of hearing.**

**6.5(1) Delivery.** Delivery of the notice of hearing constitutes the commencement of the contested case proceeding. Delivery may be executed by:

- a. Personal service as provided in the Iowa Rules of Civil Procedure; or
- b. Certified mail, return receipt requested; or
- c. First-class mail; or
- d. Publication, as provided in the Iowa Rules of Civil Procedure.

**6.5(2) Contents.** The notice of hearing shall contain the following information:

- a. A statement of the time, place, and nature of the hearing;
- b. A statement of the legal authority and jurisdiction under which the hearing is to be held;
- c. A reference to the particular sections of the statutes and rules involved;
- d. A short and plain statement of the matters asserted. If the agency lottery or other party is unable to state the matters in detail at the time the notice is served, the initial notice may be limited to a statement of the issues involved. Thereafter, upon application, a more definite and detailed statement shall be furnished;
- e. Identification of all parties including the name, address and telephone number of the person who will act as advocate for the agency the lottery or the state and of parties' counsel where known;
- f. Reference to the procedural rules governing conduct of the contested case proceeding; and
- g. Reference to the procedural rules governing informal settlement;

## LOTTERY DIVISION[705](cont'd)

*h. Identification of the presiding officer, if known. If not known, a description of who will serve as presiding officer (e.g., the hearing board, the commissioner of the lottery, members of the lottery board of directors, administrative law judge from the department of inspections and appeals); and*

*i. Notification of the time period in which a party may request, pursuant to Iowa Code section 17A.11(1) as amended by 1998 Iowa Acts, chapter 1202, and rule 6.6(17A), that the presiding officer be an administrative law judge.*

ITEM 6. Renumber 705—6.6(17A) as 705—6.31(17A) and adopt new rule 705—6.6(17A) as follows:

## 705—6.6(17A) Presiding officer.

6.6(1) Any party who wishes to request that the presiding officer assigned to render a proposed decision be an administrative law judge employed by the department of inspections and appeals must file a written request within 20 days after service of a notice of hearing which identifies or describes the presiding officer as the agency head or members of the agency.

6.6(2) The commissioner of the lottery may deny the request only upon a finding that one or more of the following apply:

a. Neither the agency nor any officer of the agency under whose authority the contested case is to take place is a named party to the proceeding or a real party in interest to that proceeding.

b. There is a compelling need to expedite issuance of a final decision in order to protect the public health, safety, or welfare.

c. The case involves significant policy issues of first impression that are inextricably intertwined with the factual issues presented.

d. The demeanor of the witnesses is likely to be dispositive in resolving the disputed factual issues.

e. Funds are unavailable to pay the costs of an administrative law judge and an interagency appeal.

f. The request was not timely filed.

g. The request is not consistent with a specified statute.

h. The contested case involves a license dispute which must be decided by the hearing board pursuant to Iowa Code section 99E.17(2).

6.6(3) The commissioner of the lottery shall issue a written ruling specifying the grounds for its decision within 20 days after a request for an administrative law judge is filed. If the ruling is contingent upon the availability of an administrative law judge, the parties shall be notified at least 10 days prior to hearing if a qualified administrative law judge will not be available.

6.6(4) Except as provided otherwise by another provision of law, all rulings by an administrative law judge acting as presiding officer are subject to appeal to the agency. A party must seek any available intra-agency appeal in order to exhaust adequate administrative remedies.

6.6(5) Unless otherwise provided by law, agency heads and members of multimembered agency heads, when reviewing a proposed decision upon intra-agency appeal, shall have the powers of and shall comply with the provisions of this chapter which apply to presiding officers.

ITEM 7. Amend rule 705—6.8(17A) as follows:

## 705—6.8(17A) Disqualification.

6.8(1) A presiding officer or other person shall withdraw from participation in the making of any proposed or final decision in a contested case if that person:

a. Has a personal bias or prejudice concerning a party or a representative of a party;

b. Has personally investigated, prosecuted or advocated, in connection with that case, the specific controversy underlying that case, or another pending factually related contested case, or a pending factually related controversy that may culminate in a contested case involving the same parties;

c. Is subject to the authority, direction or discretion of any person who has personally investigated, prosecuted or advocated in connection with that contested case, the specific controversy underlying that contested case, or a pending factually related contested case or controversy involving the same parties;

~~d. Has personally investigated the pending contested case by taking affirmative steps to interview witnesses directly or to obtain documents directly. The term "personally investigated" does not include either direction and supervision of assigned investigators or unsolicited receipt of oral information or documents which are relayed to assigned investigators.~~

~~e. Has acted as counsel to any person who is a private party to that proceeding within the past two years;~~

~~f. Has a personal financial interest in the outcome of the case or any other significant personal interest that could be substantially affected by the outcome of the case;~~

~~g. Has a spouse or relative within the third degree of relationship that (1) is a party to the case, or an officer, director or trustee of a party; (2) is a lawyer in the case; (3) is known to have an interest that could be substantially affected by the outcome of the case; or (4) is likely to be a material witness in the case; or~~

~~h. Has any other legally sufficient cause to withdraw from participation in the decision making in that case.~~

~~(In a situation where a presiding officer or other person knows of information which might reasonably be deemed to be a basis for disqualification and decides voluntary withdrawal is unnecessary, that person shall submit the relevant information for the record by affidavit and shall provide for the record a statement of the reasons for the determination that withdrawal is inappropriate.)~~

6.8(2) The term "personally investigated" means taking affirmative steps to interview witnesses directly or to obtain documents or other information directly. The term "personally investigated" does not include general direction and supervision of assigned investigators, unsolicited receipt of information which is relayed to assigned investigators, review of another person's investigative work product in the course of determining whether there is probable cause to initiate a proceeding, or exposure to factual information while performing other agency functions, including fact gathering for purposes other than investigation of the matter which culminates in a contested case. Factual information relevant to the merits of a contested case received by a person who later serves as presiding officer in that case shall be disclosed if required by Iowa Code section 17A.17 as amended by 1998 Iowa Acts, chapter 1202, section 19, and subrules 6.8(3) and 6.22(9).

6.8(3) In a situation where a presiding officer or other person knows of information which might reasonably be deemed to be a basis for disqualification and decides voluntary withdrawal is unnecessary, that person shall submit the relevant information for the record by affidavit and shall provide for the record a statement of the reasons for the determination that withdrawal is unnecessary.

6.8(2-4) If a party asserts disqualification on any appropriate grounds, including those listed in this rule subrule

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6.8(1), the party shall file a motion supported by an affidavit pursuant to Iowa Code subsection 17A.17(4-7). The motion must be filed as soon as practicable after the reason alleged in the motion becomes known to the party.

If, during the course of the hearing, a party first becomes aware of evidence of bias or other grounds for disqualification, the party may move for disqualification but must establish the grounds by the introduction of evidence into the record.

If the presiding officer determines that disqualification is appropriate, the presiding officer or other person shall withdraw. If the presiding officer determines that withdrawal is not required, the presiding officer shall enter an order to that effect. A party asserting disqualification may seek an interlocutory appeal under rule 6.24(17A) and seek a stay under rule 6.28(17A).

ITEM 8. Amend rule 705—6.14(17A) as follows:

**705—6.14(17A) Motions.**

6.14(1) No technical form for motions is required. However, prehearing motions must be in writing, state the grounds for relief, and state the relief sought. ~~Any motion for summary judgment shall comply with the Iowa Rules of Civil Procedure and is subject to disposition according to the requirement of those rules.~~

6.14(2) Any party may file a written response to a motion within ten days after the motion is served, unless the time period is extended or shortened by rules of the agency the lottery or the presiding officer. The presiding officer may consider a failure to respond within the required time period in ruling on a motion.

6.14(3) The presiding officer may schedule oral argument on any motion.

6.14(4) Motions pertaining to the hearing, including except motions for summary judgment, must be filed and served at least ~~15~~ ten days prior to the date of hearing unless there is good cause for permitting later action or the time for such action is lengthened or shortened by rule of the agency the lottery or an order of the presiding officer.

6.14(5) *Motions for summary judgment. Motions for summary judgment shall comply with the requirements of Iowa Rule of Civil Procedure 237 and shall be subject to disposition according to the requirements of that rule to the extent such requirements are not inconsistent with the provisions of this rule or any other provision of law governing the procedure in contested cases.*

*Motions for summary judgment must be filed and served at least 45 days prior to the scheduled hearing date, or other time period determined by the presiding officer. Any party resisting the motion shall file and serve a resistance within 15 days, unless otherwise ordered by the presiding officer, from the date a copy of the motion was served. The time fixed for hearing or nonoral submission shall be not less than 20 days after the filing of the motion, unless a shorter time is ordered by the presiding officer. A summary judgment order rendered on all issues in a contested case is subject to rehearing pursuant to rule 6.27(17A) and appeal pursuant to rule 6.26(17A).*

ITEM 9. Amend rule 705—6.21(17A) as follows:

**705—6.21(17A) Default.**

6.21(1) If a party fails to appear or participate in a contested case proceeding after proper service of notice, the presiding officer may, if no adjournment is granted, enter a default decision or proceed with the hearing and render a decision in the absence of the party.

6.21(2) Where appropriate and not contrary to law, any party may move for default against a party who has requested the contested case proceeding and has failed to file a required pleading or has failed to appear after proper service.

6.21(3) *Default decisions or decisions rendered on the merits after a party has failed to appear or participate in a contested case proceeding become final agency action unless, within 15 days after the date of notification or mailing of the decision, a motion to vacate is filed and served on all parties or an appeal of a decision on the merits is timely initiated within the time provided by rule 6.26(17A). A motion to vacate must state all facts relied upon by the moving party which establish that good cause existed for that party's failure to appear or participate at the contested case proceeding. Each fact so stated must be substantiated by at least one sworn affidavit of a person with personal knowledge of each such fact, which affidavit(s) must be attached to the motion.*

6.21(4) *The time for further appeal of a decision for which a timely motion to vacate has been filed is stayed pending a decision on the motion to vacate.*

6.21(5) *Properly substantiated and timely filed motions to vacate shall be granted only for good cause shown. The burden of proof as to good cause is on the moving party. Adverse parties shall have ten days to respond to a motion to vacate. Adverse parties shall be allowed to conduct discovery as to the issue of good cause and to present evidence on the issue prior to a decision on the motion, if a request to do so is included in that party's response.*

6.21(6) *"Good cause" for purposes of this rule shall have the same meaning as "good cause" for setting aside a default judgment under Iowa Rule of Civil Procedure 236.*

6.21(7) *A decision denying a motion to vacate is subject to further appeal within the time limit allowed for further appeal of a decision on the merits in the contested case proceeding. A decision granting a motion to vacate is subject to interlocutory appeal by the adverse party pursuant to rule 6.24(17A).*

6.21(8) *If a motion to vacate is granted and no timely interlocutory appeal has been taken, the presiding officer shall issue another notice of hearing and the contested case shall proceed accordingly.*

6.21(9) *A default decision may award any relief consistent with the request for relief made in the petition and embraced in its issues; but unless the defaulting party has appeared, it cannot exceed the relief demanded.*

6.21(10) *A default decision may provide either that the default decision is to be stayed pending a timely motion to vacate or that the default decision is to take effect immediately, subject to a request for stay under rule 6.28(17A).*

ITEM 10. Amend rule 705—6.22(17A) as follows:

**705—6.22(17A) Ex parte communication.**

6.22(1) ~~Prohibited communications. Following Unless required for the disposition of ex parte matters specifically authorized by statute, following issuance of the notice of hearing, there shall be no communication, directly or indirectly, between the presiding officer and any party or representative of any party or any other person with a direct or indirect interest in such case in connection with any issue of fact or law in the case and any person assigned to render a proposed or final decision or to make findings of fact or conclusions of law except upon notice and opportunity for all parties to participate. This does not prohibit persons jointly assigned such tasks from communicating with each other. Nothing in this provision is intended to preclude the presiding officer persons assigned to render a proposed or final de-~~

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cision in a contested case or to make findings of fact or conclusions of law in such a case from communicating with members of the lottery or seeking the advice or help of persons other than those with a personal interest in, or those engaged in personally investigating as defined in subrule 6.8(1-2), prosecuting, or advocating in, either the case under consideration or a pending factually related case involving the same parties as long as that advice or help does not violate Iowa Code subsection 17A.12(8) those persons do not directly or indirectly communicate to the presiding officer any ex parte communications they have received of a type that the presiding officer would be prohibited from receiving or that furnish, augment, diminish, or modify the evidence in the record.

6.22(2) Prohibitions on ex parte communications commence with the issuance of the notice of hearing in a contested case and continue for as long as the case is pending.

6.22(3) Written, oral or other forms of communication are "ex parte" if made without notice and opportunity for all parties to participate.

6.22(4) To avoid prohibited ex parte communications notice must be given in a manner reasonably calculated to give all parties a fair opportunity to participate. Notice of written communications shall be provided in compliance with rule 6.11(17A) and may be supplemented by telephone, facsimile, electronic mail or other means of notification. Where permitted, oral communications may be initiated through conference telephone call including all parties or their representatives.

6.22(5) Persons who jointly act as presiding officer in a pending contested case may communicate with each other without notice or opportunity for parties to participate.

6.22(6) The executive director or other persons may be present in deliberations or otherwise advise the presiding officer without notice or opportunity for parties to participate as long as they are not disqualified from participating in the making of a proposed or final decision under any provision of law and they comply with subrule 6.22(1).

6.22(7) Communications with the presiding officer involving uncontested scheduling or procedural matters do not require notice or opportunity for parties to participate. Parties should notify other parties prior to initiating such contact with the presiding officer when feasible, and shall notify other parties when seeking to continue hearings or other deadlines pursuant to rule 6.16(17A).

6.22(2.8) Disclosure of prohibited communications. Any person who receives a communication prohibited by subrule 6.22(1) shall disclose that communication to all parties. A copy of any prohibited written communication or a summary of any prohibited oral communication shall be submitted for inclusion in the record. A presiding officer who receives a prohibited ex parte communication during the pendency of a contested case must initially determine if the effect of the communication is so prejudicial that the presiding officer should be disqualified. If the presiding officer determines that disqualification is warranted, a copy of any prohibited written communication, all written responses to the communication, a written summary stating the substance of any prohibited oral or other communication not available in written form for disclosure, all responses made, and the identity of each person from whom the presiding officer received a prohibited ex parte communication shall be submitted for inclusion in the record under seal by protective order. If the presiding officer determines that disqualification is not warranted, such documents shall be submitted for inclusion in

the record and served on all parties. Any party desiring to rebut the prohibited communication must be allowed the opportunity to do so upon written request filed within ten days after notice of the communication.

6.22(9) Promptly after being assigned to serve as presiding officer at any stage in a contested case proceeding, a presiding officer shall disclose to all parties material factual information received through ex parte communication prior to such assignment unless the factual information has already been or shortly will be disclosed pursuant to Iowa Code section 17A.13(2) or through discovery. Factual information contained in an investigative report or similar document need not be separately disclosed by the presiding officer as long as such documents have been or will shortly be provided to the parties.

6.22(3.10) The presiding officer or the agency may impose render a proposed or final decision imposing appropriate sanctions for violations of this rule. Possible sanctions include including default, a decision against the offending party, censure, or suspension, or revocation of the privilege to practice before the agency the lottery. Violation of ex parte communication prohibitions by agency personnel shall be reported to the commissioner of the lottery for possible sanctions including and censure, suspension, dismissal, or other disciplinary action against agency personnel.

ITEM 11. Amend rule 705—6.28(17A) as follows:

705—6.28(17A) Stays of agency actions.

6.28(1) When available.

a. Any party to a contested case proceeding may petition the lottery for a stay of an order issued in that proceeding or for other temporary remedies, pending review by the agency. The petition for a stay shall be filed with the notice of appeal and shall state the reasons justifying a stay or other temporary remedy. The hearing board may rule on the stay or authorize the presiding officer to do so.

b. Any party to a contested case proceeding may petition the lottery for a stay or other temporary remedies pending judicial review, of all or part of that proceeding. The petition for a stay shall state the reasons justifying a stay or other temporary remedy.

6.28(2) When granted. In determining whether to grant a stay, the presiding officer or hearing board shall consider the factors listed in 17A.19(5) as amended by 1998 Iowa Acts, chapter 1202, section 23(5c). whether substantial questions exist as to the propriety of the order for which a stay is requested, whether the party will suffer substantial and irreparable injury without the stay, and whether, and the extent to which, the interests of the public and other persons will be adversely affected by such a stay.

6.28(3) Vacation. A stay may be vacated by the issuing authority upon application of the lottery or any other party.

ITEM 12. Adopt new rule 705—6.29(17A) as follows:

705—6.29(17A) No factual dispute contested cases. If the parties agree that no dispute of material fact exists as to a matter that would be a contested case if such a dispute of fact existed, the parties may present all relevant admissible evidence either by stipulation or otherwise as agreed by the parties, without necessity for the production of evidence at an evidentiary hearing. If such agreement is reached, a jointly submitted schedule detailing the method and timetable for submission of the record, briefs and oral argument should be submitted to the presiding officer for approval as soon as practicable. If the parties cannot agree, any party may file and serve

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a motion for summary judgment pursuant to the rules governing such motions.

ITEM 13. Adopt new rule 705—6.30(17A) as follows:

**705—6.30(17A) Emergency adjudicative proceedings.**

**6.30(1) Necessary emergency action.** To the extent necessary to prevent or avoid immediate danger to the public health, safety, or welfare, and consistent with the Constitution and other provisions of law, the lottery may issue a written order in compliance with Iowa Code section 17A.18 to suspend a license in whole or in part, order the cessation of any continuing activity, order affirmative action, or take other action within the jurisdiction of the lottery by emergency adjudicative order. Before issuing an emergency adjudicative order the lottery shall consider factors including, but not limited to, the following:

a. Whether there has been a sufficient factual investigation to assure that the lottery is proceeding on the basis of reliable information;

b. Whether the specific circumstances which pose immediate danger to the public health, safety or welfare have been identified and determined to be continuing;

c. Whether the person required to comply with the emergency adjudicative order may continue to engage in other activities without posing immediate danger to the public health, safety or welfare;

d. Whether imposition of monitoring requirements or other interim safeguards would be sufficient to protect the public health, safety or welfare; and

e. Whether the specific action contemplated by the agency is necessary to avoid the immediate danger.

**6.30(2) Issuance of order.**

a. An emergency adjudicative order shall contain findings of fact, conclusions of law, and policy reasons to justify the determination of an immediate danger in the lottery's decision to take immediate action.

b. The written emergency adjudicative order shall be immediately delivered to persons who are required to comply with the order by utilizing one or more of the following procedures:

(1) Personal delivery;

(2) Certified mail, return receipt requested, to the last address on file with the agency;

(3) Certified mail to the last address on file with the agency;

(4) First-class mail to the last address on file with the agency; or

(5) Fax may be used as the sole method of delivery if the person required to comply with the order has filed a written request that agency orders be sent by fax and has provided a fax number for that purpose.

c. To the degree practicable, the agency shall select the procedure for providing written notice that best ensures prompt, reliable delivery.

**6.30(3) Oral notice.** Unless the written emergency adjudicative order is provided by personal delivery on the same day that the order issues, the agency shall make reasonable immediate efforts to contact by telephone the persons who are required to comply with the order.

**6.30(4) Completion of proceedings.** After the issuance of an emergency adjudicative order, the agency shall proceed as quickly as feasible to complete any proceedings that would be required if the matter did not involve an immediate danger.

Issuance of a written emergency adjudicative order shall include notification of the date on which agency proceedings are scheduled for completion. After issuance of an emergency adjudicative order, continuance of further agency proceedings to a later date will be granted only in compelling circumstances upon application in writing.

ITEM 14. Rescind 705—Chapter 7 and adopt the following new chapter in lieu thereof:

CHAPTER 7  
DECLARATORY ORDERS

**705—7.1(17A) Petition for declaratory order.** Any person may file a petition with the lottery for a declaratory order as to the applicability to specified circumstances of a statute, rule, or order within the primary jurisdiction of the lottery, at the Iowa Lottery, 2015 Grand Avenue, Des Moines, Iowa 50312-4999. A petition is deemed filed when it is received by that office. The lottery shall provide the petitioner with a file-stamped copy of the petition if the petitioner provides the lottery an extra copy for this purpose. The petition must be typewritten or legibly handwritten in ink and must substantially conform to the following form:

THE IOWA LOTTERY

Petition by (Name of Petitioner)  
for a Declaratory Order on (Cite  
provisions of law involved).

} PETITION FOR  
DECLARATORY  
ORDER

The petition must provide the following information:

1. A clear and concise statement of all relevant facts on which the order is requested.

2. A citation and the relevant language of the specific statutes, rules, policies, decisions, or orders, whose applicability is questioned, and any other relevant law.

3. The questions petitioner wants answered, stated clearly and concisely.

4. The answers to the questions desired by the petitioner and a summary of the reasons urged by the petitioner in support of those answers.

5. The reasons for requesting the declaratory order and disclosure of the petitioner's interest in the outcome.

6. A statement indicating whether the petitioner is currently a party to another proceeding involving the questions at issue and whether, to the petitioner's knowledge, those questions have been decided by, are pending determination by, or are under investigation by, any governmental entity.

7. The names and addresses of other persons, or a description of any class of persons, known by petitioner to be affected by, or interested in, the questions presented in the petition.

8. Any request by petitioner for a meeting provided for by 7.7(17A).

The petition must be dated and signed by the petitioner or the petitioner's representative. It must also include the name, mailing address, and telephone number of the petitioner and petitioner's representative, and a statement indicating the person to whom communications concerning the petition should be directed.

**705—7.2(17A) Notice of petition.** Within 15 days after receipt of a petition for a declaratory order, the lottery shall give notice of the petition to all persons not served by the petition-

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er pursuant to 7.6(17A) to whom notice is required by any provision of law. The lottery may also give notice to any other persons.

**705—7.3(17A) Intervention.**

**7.3(1)** Persons who qualify under any applicable provision of law as an intervenor and who file a petition for intervention within 25 days of the filing of a petition for declaratory order shall be allowed to intervene in a proceeding for a declaratory order.

**7.3(2)** Any person who files a petition for intervention at any time prior to the issuance of an order may be allowed to intervene in a proceeding for a declaratory order at the discretion of the lottery.

**7.3(3)** A petition for intervention shall be filed at the Iowa Lottery, 2015 Grand Avenue, Des Moines, Iowa 50312-4999. Such a petition is deemed filed when it is received by that office. The lottery will provide the petitioner with a file-stamped copy of the petition for intervention if the petitioner provides an extra copy for this purpose. A petition for intervention must be typewritten or legibly handwritten in ink and must substantially conform to the following form:

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**THE IOWA LOTTERY**

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Petition by (Name of Original Petitioner) for a Declaratory Order on (Cite provisions of law cited in original petition).	}	<b>PETITION FOR INTERVENTION</b>
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The petition for intervention must provide the following information:

1. Facts supporting the intervenor's standing and qualifications for intervention.
2. The answers urged by the intervenor to the question or questions presented and a summary of the reasons urged in support of those answers.
3. Reasons for requesting intervention and disclosure of the intervenor's interest in the outcome.
4. A statement indicating whether the intervenor is currently a party to any proceeding involving the questions at issue and whether, to the intervenor's knowledge, those questions have been decided by, are pending determination by, or are under investigation by, any governmental entity.
5. The names and addresses of any additional persons, or a description of any additional class of persons, known by the intervenor to be affected by, or interested in, the questions presented.
6. Whether the intervenor consents to be bound by the determination of the matters presented in the declaratory order proceeding.

The petition must be dated and signed by the intervenor or the intervenor's representative. It must also include the name, mailing address, and telephone number of the intervenor and intervenor's representative, and a statement indicating the person to whom communications should be directed.

**705—7.4(17A) Briefs.** The petitioner or any intervenor may file a brief in support of the position urged. The lottery may request a brief from the petitioner, any intervenor, or any other person concerning the questions raised.

**705—7.5(17A) Inquiries.** Inquiries concerning the status of a declaratory order proceeding may be made to the Commissioner, Iowa Lottery, 2015 Grand Avenue, Des Moines, Iowa 50312-4999.

**705—7.6(17A) Service and filing of petitions and other papers.**

**7.6(1)** When service required. Except where otherwise provided by law, every petition for declaratory order, petition for intervention, brief, or other paper filed in a proceeding for a declaratory order shall be served upon each of the parties of record to the proceeding, and on all other persons identified in the petition for declaratory order or petition for intervention as affected by or interested in the questions presented, simultaneously with their filing. The party filing a document is responsible for service on all parties and other affected or interested persons.

**7.6(2)** Filing—when required. All petitions for declaratory orders, petitions for intervention, briefs, or other papers in a proceeding for a declaratory order shall be filed with the Iowa Lottery, 2015 Grand Avenue, Des Moines, Iowa 50312-4999. All petitions, briefs, or other papers that are required to be served upon a party shall be filed simultaneously with the lottery.

**7.6(3)** Method of service, time of filing, and proof of mailing. Method of service, time of filing, and proof of mailing shall be as provided by 705 IAC 6.11(17A).

**705—7.7(17A) Consideration.** Upon request by petitioner, the lottery must schedule a brief and informal meeting between the original petitioner, all intervenors, and the lottery, a member of the lottery board, or a member of the staff of the lottery, to discuss the questions raised. The lottery may solicit comments from any person on the questions raised. Also, comments on the questions raised may be submitted to the lottery by any person.

**705—7.8(17A) Action on petition.**

**7.8(1)** Within the time allowed by 1998 Iowa Acts, chapter 1202, section 13(5), after receipt of a petition for a declaratory order, the commissioner of the lottery or designee shall take action on the petition as required by 1998 Iowa Acts, chapter 1202, section 13(5).

**7.8(2)** The date of issuance of an order or of a refusal to issue an order is as defined in rule 6.2(17A).

**705—7.9(17A) Refusal to issue order.**

**7.9(1)** The lottery shall not issue a declaratory order where prohibited by 1998 Iowa Acts, chapter 1202, section 13(1), and may refuse to issue a declaratory order on some or all questions raised for the following reasons:

1. The petition does not substantially comply with the required form.
2. The petition does not contain facts sufficient to demonstrate that the petitioner will be aggrieved or adversely affected by the failure of the lottery to issue an order.
3. The lottery does not have jurisdiction over the questions presented in the petition.
4. The questions presented by the petition are also presented in a current rule making, contested case, or other agency or judicial proceeding, that may definitively resolve them.
5. The questions presented by the petition would more properly be resolved in a different type of proceeding or by another body with jurisdiction over the matter.
6. The facts or questions presented in the petition are unclear, overbroad, insufficient, or otherwise inappropriate as a basis upon which to issue an order.
7. There is no need to issue an order because the questions raised in the petition have been settled due to a change in circumstances.
8. The petition is not based upon facts calculated to aid in the planning of future conduct but is, instead, based solely

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upon prior conduct in an effort to establish the effect of that conduct or to challenge an agency decision already made.

9. The petition requests a declaratory order that would necessarily determine the legal rights, duties, or responsibilities of other persons who have not joined in the petition, intervened separately, or filed a similar petition and whose position on the questions presented may fairly be presumed to be adverse to that of petitioner.

10. The petitioner requests the lottery to determine whether a statute is unconstitutional on its face.

7.9(2) A refusal to issue a declaratory order must indicate the specific grounds for the refusal and constitutes final agency action on the petition.

7.9(3) Refusal to issue a declaratory order pursuant to this provision does not preclude the filing of a new petition that seeks to eliminate the grounds for the refusal to issue an order.

**705—7.10(17A) Contents of declaratory order—effective date.** In addition to the order itself, a declaratory order must contain the date of its issuance, the name of petitioner and all intervenors, the specific statutes, rules, policies, decisions, or orders involved, the particular facts upon which it is based, and the reasons for its conclusion.

A declaratory order is effective on the date of issuance.

**705—7.11(17A) Copies of orders.** A copy of all orders issued in response to a petition for a declaratory order shall be mailed promptly to the original petitioner and all intervenors.

**705—7.12(17A) Effect of a declaratory order.** A declaratory order has the same status and binding effect as a final order issued in a contested case proceeding. It is binding on the lottery, the petitioner, and any intervenors who consent to be bound and is applicable only in circumstances where the relevant facts and the law involved are indistinguishable from those on which the order was based. As to all other persons, a declaratory order serves only as precedent and is not binding on the lottery. The issuance of a declaratory order constitutes final agency action on the petition.

These rules are intended to implement Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202.

ITEM 15. Adopt new rule 705—13.23(99E) as follows:

**705—13.23(99E) Prize insurance fund.** The prize insurance fund may be used for any of the following purposes:

1. To pay prizes for any on-line game prize obligation if the amount available to fund an on-line game prize is insufficient;
2. To support a special promotion to retire an on-line game; e.g., a television show or a second chance drawing;
3. To transfer amounts to a successor game to pay prize obligations for a different on-line game.

This rule is intended to implement Iowa Code sections 99E.9(3), 99E.9(3)"b," 99E.9(3)"e," and 99E.9(3)"g."

ITEM 16. Adopt the following new chapter:

## CHAPTER 14

## AGENCY PROCEDURE FOR RULE MAKING

**705—14.1(17A) Applicability.** Except to the extent otherwise expressly provided by statute, all rules adopted by the lottery are subject to the provisions of Iowa Code chapter 17A, the Iowa administrative procedure Act, and the provisions of this chapter.

**705—14.2(17A) Advice on possible rules before notice of proposed rule adoption.** In addition to seeking information

by other methods, the lottery may, before publication of a Notice of Intended Action under Iowa Code section 17A.4(1)"a," solicit comments from the public on a subject matter of possible rule making by the lottery by causing notice to be published in the Iowa Administrative Bulletin of the subject matter and indicating where, when, and how persons may comment.

**705—14.3(17A) Public rule-making docket.**

14.3(1) Docket maintained. The lottery shall maintain a current public rule-making docket.

14.3(2) Anticipated rule making. The rule-making docket shall list each anticipated rule-making proceeding. A rule-making proceeding is deemed "anticipated" from the time a draft of proposed rules is distributed for internal discussion within the lottery. For each anticipated rule-making proceeding the docket shall contain a listing of the precise subject matter which may be submitted for consideration by the board for subsequent proposal under the provisions of Iowa Code section 17A.4(1)"a," the name and address of agency personnel with whom persons may communicate with respect to the matter, and an indication of the present status within the lottery of that possible rule. The lottery may also include in the docket other subjects upon which public comment is desired.

14.3(3) Pending rule-making proceedings. The rule-making docket shall list each pending rule-making proceeding. A rule-making proceeding is pending from the time it is commenced, by publication in the Iowa Administrative Bulletin of a Notice of Intended Action pursuant to Iowa Code section 17A.4(1)"a," to the time it is terminated, by publication of a Notice of Termination in the Iowa Administrative Bulletin or the rule becoming effective. For each rule-making proceeding, the docket shall indicate:

- a. The subject matter of the proposed rule;
- b. A citation to all published notices relating to the proceeding;
- c. Where written submissions on the proposed rule may be inspected;
- d. The time during which written submissions may be made;
- e. The names of persons who have made written requests for an opportunity to make oral presentations on the proposed rule, where those requests may be inspected, and where and when oral presentations may be made;
- f. Whether a written request for the issuance of a regulatory analysis, or a concise statement of reasons, has been filed, whether such an analysis or statement or a fiscal impact statement has been issued, and where any such written request, analysis, or statement may be inspected;
- g. The current status of the proposed rule and any agency determinations with respect thereto;
- h. Any known timetable for agency decisions or other action in the proceeding;
- i. The date of the rule's adoption;
- j. The date of the rule's filing, indexing, and publication;
- k. The date on which the rule will become effective; and
- l. Where the rule-making record may be inspected.

**705—14.4(17A) Notice of proposed rule making.**

14.4(1) Contents. At least 35 days before the adoption of a rule the lottery shall cause Notice of Intended Action to be published in the Iowa Administrative Bulletin. The Notice of Intended Action shall include:

- a. A brief explanation of the purpose of the proposed rule;

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- b. The specific legal authority for the proposed rule;
- c. Except to the extent impracticable, the text of the proposed rule;
- d. Where, when, and how persons may present their views on the proposed rule; and
- e. Where, when, and how persons may demand an oral proceeding on the proposed rule if the notice does not already provide for one.

Where inclusion of the complete text of a proposed rule in the Notice of Intended Action is impracticable, the lottery shall include in the notice a statement fully describing the specific subject matter of the omitted portion of the text of the proposed rule, the specific issues to be addressed by that omitted text of the proposed rule, and the range of possible choices being considered by the lottery for the resolution of each of those issues.

**14.4(2) Incorporation by reference.** A proposed rule may incorporate other materials by reference only if it complies with all of the requirements applicable to the incorporation by reference of other materials in an adopted rule that are contained in subrule 14.12(2) of this chapter.

**14.4(3) Copies of notices.** Persons desiring to receive copies of future Notices of Intended Action by subscription must file with the lottery a written request indicating the name and address to which such notices should be sent. Within seven days after submission of a Notice of Intended Action to the administrative rules coordinator for publication in the Iowa Administrative Bulletin, the lottery shall mail or electronically transmit a copy of that notice to subscribers who have filed a written request for either mailing or electronic transmittal with the lottery for Notices of Intended Action. The written request shall be accompanied by payment of the subscription price which may cover the full cost of the subscription service, including its administrative overhead and the cost of copying and mailing the Notices of Intended Action for a period of six months.

**705—14.5(17A) Public participation.**

**14.5(1) Written comments.** For at least 20 days after publication of the Notice of Intended Action, persons may submit argument, data, and views, in writing, on the proposed rule. Such written submissions should identify the proposed rule to which they relate and should be submitted to the Iowa Lottery, 2015 Grand Avenue, Des Moines, Iowa 50312-4999 or the person designated in the Notice of Intended Action.

**14.5(2) Oral proceedings.** The lottery may, at any time, schedule an oral proceeding on a proposed rule. The lottery shall schedule an oral proceeding on a proposed rule if, within 20 days after the published Notice of Intended Action, a written request for an opportunity to make oral presentations is submitted to the lottery by the administrative rules review committee, a governmental subdivision, an agency, an association having not less than 25 members, or at least 25 persons. That request must also contain the following additional information:

- a. A request by one or more individual persons must be signed by each of them and include the address and telephone number of each of them.
- b. A request by an association must be signed by an officer or designee of the association and must contain a statement that the association has at least 25 members and the address and telephone number of the person signing that request.
- c. A request by an agency or governmental subdivision must be signed by an official having authority to act on be-

half of the entity and must contain the address and telephone number of the person signing that request.

**14.5(3) Conduct of oral proceedings.**

a. **Applicability.** This subrule applies only to those oral rule-making proceedings in which an opportunity to make oral presentations is authorized or required by Iowa Code section 17A.4(1)“b” as amended by 1998 Iowa acts, chapter 1202, section 8, or this chapter.

b. **Scheduling and notice.** An oral proceeding on a proposed rule may be held in one or more locations and shall not be held earlier than 20 days after notice of its location and time is published in the Iowa Administrative Bulletin. That notice shall also identify the proposed rule by ARC number and citation to the Iowa Administrative Bulletin.

c. **Presiding officer.** The lottery board, a member of the lottery board, or another person designated by the lottery board who will be familiar with the substance of the proposed rule, shall preside at the oral proceeding on a proposed rule. If the lottery board does not preside, the presiding officer shall prepare a memorandum for consideration by the board summarizing the contents of the presentations made at the oral proceeding unless the board determines that such a memorandum is unnecessary because the board will personally listen to or read the entire transcript of the oral proceeding.

d. **Conduct of proceeding.** At an oral proceeding on a proposed rule, persons may make oral statements and make documentary and physical submissions, which may include data, views, comments or arguments concerning the proposed rule. Persons wishing to make oral presentations at such a proceeding are encouraged to notify the lottery at least one business day prior to the proceeding and indicate the general subject of their presentations. At the proceeding, those who participate shall indicate their names and addresses, identify any persons or organizations they may represent, and provide any other information relating to their participation deemed appropriate by the presiding officer. Oral proceedings shall be open to the public and shall be recorded by stenographic or electronic means.

(1) At the beginning of the oral proceeding, the presiding officer shall give a brief synopsis of the proposed rule, a statement of the statutory authority for the proposed rule, and the reasons for the lottery board's decision to propose the rule. The presiding officer may place time limitations on individual oral presentations when necessary to ensure the orderly and expeditious conduct of the oral proceeding. To encourage joint oral presentations and to avoid repetition, additional time may be provided for persons whose presentations represent the views of other individuals as well as their own views.

(2) Persons making oral presentations are encouraged to avoid restating matters which have already been submitted in writing.

(3) To facilitate the exchange of information, the presiding officer may, where time permits, open the floor to questions or general discussion.

(4) The presiding officer shall have the authority to take any reasonable action necessary for the orderly conduct of the meeting.

(5) Physical and documentary submissions presented by participants in the oral proceeding shall be submitted to the presiding officer. Such submissions become the property of the lottery.

(6) The oral proceeding may be continued by the presiding officer to a later time without notice other than by announcement at the hearing.

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(7) Participants in an oral proceeding shall not be required to take an oath or to submit to cross-examination. However, the presiding officer in an oral proceeding may question participants and permit the questioning of participants by other participants about any matter relating to that rule-making proceeding, including any prior written submissions made by those participants in that proceeding; but no participant shall be required to answer any question.

(8) The presiding officer in an oral proceeding may permit rebuttal statements and request the filing of written statements subsequent to the adjournment of the oral presentations.

**14.5(4) Additional information.** In addition to receiving written comments and oral presentations on a proposed rule according to the provisions of this rule, the lottery may obtain information concerning a proposed rule through any other lawful means deemed appropriate under the circumstances.

**14.5(5) Accessibility.** The lottery shall schedule oral proceedings in rooms accessible to and functional for persons with physical disabilities. Persons who have special requirements should contact the Iowa Lottery, 2015 Grand Avenue, Des Moines, Iowa 50312-4999, telephone number (515)281-7900 in advance to arrange access or other needed services.

**705—14.6(17A) Regulatory analysis.**

**14.6(1) Definition of small business.** A "small business" is defined in 1998 Iowa Acts, chapter 1202, section 10(7).

**14.6(2) Mailing list.** Small businesses or organizations of small businesses may be registered on the lottery's small business impact list by making a written application addressed to the Iowa Lottery, 2015 Grand Avenue, Des Moines, Iowa 50312-4999. The application for registration shall state:

- a. The name of the small business or organization of small businesses;
- b. Its address;
- c. The name of a person authorized to transact business for the applicant;
- d. A description of the applicant's business or organization. An organization representing 25 or more persons who qualify as a small business shall indicate that fact.
- e. Whether the registrant desires copies of Notices of Intended Action at cost, or desires advance notice of the subject of all or some specific category of proposed rule making affecting small business.

The lottery may at any time request additional information from the applicant to determine whether the applicant is qualified as a small business or as an organization of 25 or more small businesses. The lottery may periodically send a letter to each registered small business or organization of small businesses asking whether that business or organization wishes to remain on the registration list. The name of a small business or organization of small businesses will be removed from the list if a negative response is received, or if no response is received within 30 days after the letter is sent.

**14.6(3) Time of mailing.** Within seven days after submission of a Notice of Intended Action to the administrative rules coordinator for publication in the Iowa Administrative Bulletin, the lottery shall mail to all registered small businesses or organizations of small businesses, in accordance with their request, either a copy of the Notice of Intended Action or notice of the subject of that proposed rule making. In the case of a rule that may have an impact on small business adopted in reliance upon Iowa Code section 17A.4(2), the lottery shall mail notice of the adopted rule to registered

businesses or organizations prior to the time the adopted rule is published in the Iowa Administrative Bulletin.

**14.6(4) Qualified requesters for regulatory analysis—economic impact.** The lottery shall issue a regulatory analysis of a proposed rule that conforms to the requirements of 1998 Iowa Acts, chapter 1202, section 10(2a), after a proper request from:

- a. The administrative rules coordinator;
- b. The administrative rules review committee.

**14.6(5) Qualified requesters for regulatory analysis—business impact.** The lottery shall issue a regulatory analysis of a proposed rule that conforms to the requirements of 1998 Iowa Acts, chapter 1202, section 10(2b), after a proper request from:

- a. The administrative rules review committee;
- b. The administrative rules coordinator;
- c. At least 25 or more persons who sign the request provided that each represents a different small business;
- d. An organization representing at least 25 small businesses. That organization shall list the name, address and phone number of not less than 25 small businesses it represents.

**14.6(6) Time period for analysis.** Upon receipt of a timely request for a regulatory analysis the lottery shall adhere to the time lines described in 1998 Iowa Acts, chapter 1202, section 10(4).

**14.6(7) Contents of request.** A request for a regulatory analysis is made when it is mailed or delivered to the lottery. The request shall be in writing and satisfy the requirements of 1998 Iowa Acts, chapter 1202, section 10(1).

**14.6(8) Contents of concise summary.** The contents of the concise summary shall conform to the requirements of 1998 Iowa Acts, chapter 1202, section 10(4,5).

**14.6(9) Publication of a concise summary.** The Iowa lottery shall make available to the maximum extent feasible, copies of the published summary in conformance with 1998 Iowa Acts, chapter 1202, section 10(5).

**14.6(10) Regulatory analysis contents—rules review committee or rules coordinator.** When a regulatory analysis is issued in response to a written request from the administrative rules review committee, or the administrative rules coordinator, the regulatory analysis shall conform to the requirements of 1998 Iowa Acts, chapter 1202, section 10(2a) unless a written request expressly waives one or more of the items listed in the section.

**14.6(11) Regulatory analysis contents—substantial impact on small business.** When a regulatory analysis is issued in response to a written request from the administrative rules review committee, the administrative rules coordinator, at least 25 persons signing that request who each qualify as a small business or by an organization representing at least 25 small businesses, the regulatory analysis shall conform to the requirements of 1998 Iowa Acts, chapter 1202, section 10(2b).

**705—14.7(17A,25B) Fiscal impact statement.**

**14.7(1) A proposed rule that mandates additional combined expenditures exceeding \$100,000 by all affected political subdivisions or agencies and entities which contract with political subdivisions to provide services must be accompanied by a fiscal impact statement outlining the costs associated with the rule. A fiscal impact statement must satisfy the requirements of Iowa Code section 25B.6.**

**14.7(2) If the lottery determines at the time it adopts a rule that the fiscal impact statement upon which the rule is based contains errors, the lottery shall, at the same time, issue a cor-**

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rected fiscal impact statement and publish the corrected fiscal impact statement in the Iowa Administrative Bulletin.

**705—14.8(17A) Time and manner of rule adoption.**

**14.8(1)** Time of adoption. The lottery shall not adopt a rule until the period for making written submissions and oral presentations has expired. Within 180 days after the later of the publication of the Notice of Intended Action, or the end of oral proceedings thereon, the lottery shall adopt a rule pursuant to the rule-making proceeding or terminate the proceeding by publication of a notice to that effect in the Iowa Administrative Bulletin.

**14.8(2)** Consideration of public comment. Before the adoption of a rule, the lottery shall consider fully all of the written submissions and oral submissions received in that rule-making proceeding or any memorandum summarizing such oral submissions, and any regulatory analysis or fiscal impact statement issued in that rule-making proceeding.

**14.8(3)** Reliance on agency expertise. Except as otherwise provided by law, the lottery may use its own experience, technical competence, specialized knowledge, and judgment in the adoption of a rule.

**705—14.9(17A) Variance between adopted rule and published notice of proposed rule adoption.**

**14.9(1)** The lottery shall not adopt a rule that differs from the rule proposed in the Notice of Intended Action on which the rule is based unless:

a. The differences are within the scope of the subject matter announced in the Notice of Intended Action and are in character with the issues raised in that notice; and

b. The differences are a logical outgrowth of the contents of that Notice of Intended Action and the comments submitted in response thereto; and

c. The Notice of Intended Action provided fair warning that the outcome of that rule-making proceeding could be the rule in question.

**14.9(2)** In determining whether the Notice of Intended Action provided fair warning that the outcome of that rule-making proceeding could be the rule in question, the lottery shall consider the following factors:

a. The extent to which persons who will be affected by the rule should have understood that the rule-making proceeding on which it is based could affect their interests;

b. The extent to which the subject matter of the rule or the issues determined by the rule are different from the subject matter or issues contained in the Notice of Intended Action; and

c. The extent to which the effects of the rule differ from the effects of the proposed rule contained in the Notice of Intended Action.

**14.9(3)** The lottery shall commence a rule-making proceeding within 60 days of its receipt of a petition for rule making seeking the amendment or repeal of a rule that differs from the proposed rule contained in the Notice of Intended Action upon which the rule is based, unless the lottery finds that the differences between the adopted rule and the proposed rule are so insubstantial as to make such a rule-making proceeding wholly unnecessary. A copy of any such finding and the petition to which it responds shall be sent to petitioner, the administrative rules coordinator, and the administrative rules review committee, within three days of its issuance.

**14.9(4)** Concurrent rule-making proceedings. Nothing in this rule disturbs the discretion of the lottery to initiate, concurrently, several different rule-making proceedings on the same subject with several different published Notices of Intended Action.

**705—14.10(17A) Exemptions from public rule-making procedures.**

**14.10(1)** Omission of notice and comment. To the extent the lottery for good cause finds that public notice and participation are unnecessary, impracticable, or contrary to the public interest in the process of adopting a particular rule, the lottery may adopt that rule without publishing advance Notice of Intended Action in the Iowa Administrative Bulletin and without providing for written or oral public submissions prior to its adoption. The lottery shall incorporate the required finding and a brief statement of its supporting reasons in each rule adopted in reliance upon this subrule.

**14.10(2)** Categories exempt. The following narrowly tailored categories of rules are exempt from the usual public notice and participation requirements because those requirements are unnecessary, impracticable, or contrary to the public interest with respect to each and every member of the defined class:

a. Rules relating to lottery games.

b. Reserved.

**14.10(3)** Public proceedings on rules adopted without them. The lottery may, at any time, commence a standard rule-making proceeding for the adoption of a rule that is identical or similar to a rule it adopts in reliance upon subrule 14.10(1). Upon written petition by a governmental subdivision, the administrative rules review committee, an agency, the administrative rules coordinator, an association having not less than 25 members, or at least 25 persons, the lottery shall commence a standard rule-making proceeding for any rule specified in the petition that was adopted in reliance upon subrule 14.10(1). Such a petition must be filed within one year of the publication of the specified rule in the Iowa Administrative Bulletin as an adopted rule. The rule-making proceeding on that rule must be commenced within 60 days of the receipt of such a petition. After a standard rule-making proceeding commenced pursuant to this subrule, the lottery may either readopt the rule it adopted without benefit of all usual procedures on the basis of subrule 14.10(1), or may take any other lawful action, including the amendment or repeal of the rule in question, with whatever further proceedings are appropriate.

**705—14.11(17A) Concise statement of reasons.**

**14.11(1)** General. When requested by a person, either prior to the adoption of a rule or within 30 days after its publication in the Iowa Administrative Bulletin as an adopted rule, the lottery shall issue a concise statement of reasons for the rule. Requests for such a statement must be in writing and be delivered to the Iowa Lottery, 2015 Grand Avenue, Des Moines, Iowa 50312-4999. The request should indicate whether the statement is sought for all or only a specified part of the rule. Requests will be considered made on the date received.

**14.11(2)** Contents. The concise statement of reasons shall contain:

a. The reasons for adopting the rule;

b. An indication of any change between the text of the proposed rule contained in the published Notice of Intended Action and the text of the rule as finally adopted, with the reasons for any such change;

c. The principal reasons urged in the rule-making proceeding for and against the rule, and the lottery's reasons for overruling the arguments made against the rule.

**14.11(3)** Time of issuance. After a proper request, the lottery shall issue a concise statement of reasons by the later of the time the rule is adopted or 35 days after receipt of the request.

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**705—14.12(17A) Contents, style, and form of rule.**

**14.12(1) Contents.** Each rule adopted by the lottery shall contain the text of the rule and, in addition:

- a. The date the lottery adopted the rule;
- b. A brief explanation of the principal reasons for the rule-making action if such reasons are required by 1998 Iowa Acts, chapter 1202, section 8, or the lottery in its discretion decides to include such reasons;
- c. A reference to all rules repealed, amended, or suspended by the rule;
- d. A reference to the specific statutory or other authority authorizing adoption of the rule;
- e. Any findings required by any provision of law as a prerequisite to adoption or effectiveness of the rule;
- f. A brief explanation of the principal reasons for the failure to provide for waivers to the rule if no waiver provision is included and a brief explanation of any waiver or special exceptions provided in the rule if such reasons are required by 1998 Iowa Acts, chapter 1202, section 8, or the lottery in its discretion decides to include such reasons; and
- g. The effective date of the rule.

**14.12(2) Incorporation by reference.** The lottery may incorporate by reference in a proposed or adopted rule, and without causing publication of the incorporated matter in full, all or any part of a code, standard, rule, or other matter if the lottery board finds that the incorporation of its text in the lottery's proposed or adopted rule would be unduly cumbersome, expensive, or otherwise inexpedient. The reference in the lottery's proposed or adopted rule shall fully and precisely identify the incorporated matter by location, title, citation, date, and edition, if any; shall briefly indicate the precise subject and the general contents of the incorporated matter; and shall state that the proposed or adopted rule does not include any later amendments or editions of the incorporated matter. The lottery may incorporate such matter by reference in a proposed or adopted rule only if the lottery makes copies of it readily available to the public. The rule shall state how and where copies of the incorporated matter may be obtained at cost from the lottery, and how and where copies may be obtained from an agency of the of the United States, this state, another state, or the organization, association, or persons, originally issuing that matter. The lottery shall retain permanently a copy of any materials incorporated by reference in a rule of the lottery.

If the lottery adopts standards by reference to another publication, it shall provide a copy of the publication containing the standards to the administrative rules coordinator for deposit in the state law library and may make the standards available electronically.

**14.12(3) References to materials not published in full.** When the administrative code editor decides to omit the full text of a proposed or adopted rule because publication of the full text would be unduly cumbersome, expensive, or otherwise inexpedient, the lottery shall prepare and submit to the administrative code editor for inclusion in the Iowa Administrative Bulletin and Iowa Administrative Code a summary statement describing the specific subject matter of the omitted material. This summary statement shall include the title and a brief description sufficient to inform the public of the specific nature and subject matter of the proposed or adopted rules, and of significant issues involved in these rules. The summary statement shall also describe how a copy of the full text of the proposed or adopted rule, including any unpublished matter and any matter incorporated by reference, may be obtained from the lottery. The lottery will provide a copy of that full text (at actual cost) upon request

and shall make copies of the full text available for review at the state law library and may make the standards available electronically.

At the request of the administrative code editor, the lottery shall provide a proposed statement explaining why publication of the full text would be unduly cumbersome, expensive, or otherwise inexpedient.

**14.12(4) Style and form.** In preparing its rules, the lottery shall follow the uniform numbering system, form, and style prescribed by the administrative rules coordinator.

**705—14.13(17A) Agency rule-making record.**

**14.13(1) Requirement.** The lottery shall maintain an official rule-making record for each rule it proposes by publication in the Iowa Administrative Bulletin of a Notice of Intended Action, or adopts. The rule-making record and materials incorporated by reference must be available for public inspection.

**14.13(2) Contents.** The lottery rule-making record shall contain:

a. Copies of all publications in the Iowa Administrative Bulletin with respect to the rule or the proceeding upon which the rule is based and any file-stamped copies of agency submissions to the administrative rules coordinator concerning that rule or the proceeding upon which it is based;

b. Copies of any portions of the lottery's public rule-making docket containing entries relating to the rule or the proceeding upon which the rule is based;

c. All written petitions, requests, and submissions received by the lottery, and all other written materials of a factual nature as distinguished from opinion that are relevant to the merits of the rule and that were created or compiled by the lottery and considered by the commissioner of the lottery, in connection with the formulation, proposal, or adoption of the rule or the proceeding upon which the rule is based, except to the extent the lottery is authorized by law to keep them confidential; provided, however, that when any such materials are deleted because they are authorized by law to be kept confidential, the lottery shall identify in the record the particular materials deleted and state the reasons for that deletion;

d. Any official transcript of oral presentations made in the proceeding upon which the rule is based or, if not transcribed, the stenographic record or electronic recording of those presentations, and any memorandum prepared by a presiding officer summarizing the contents of those presentations;

e. A copy of any regulatory analysis or fiscal impact statement prepared for the proceeding upon which the rule is based;

f. A copy of the rule and any concise statement of reasons prepared for that rule;

g. All petitions for amendments or repeal or suspension of the rule;

h. A copy of any objection to the issuance of that rule without public notice and participation that was filed pursuant to Iowa Code section 17A.4(2) by the administrative rules review committee, the governor, or the attorney general;

i. A copy of any objection to the rule filed by the administrative rules review committee, the governor, or the attorney general pursuant to Iowa Code section 17A.4(4), and any agency response to that objection;

j. A copy of any significant written criticism of the rule, including a summary of any petitions for waiver of the rule; and

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k. A copy of any executive order concerning the rule.

**14.13(3) Effect of record.** Except as otherwise required by a provision of law, the lottery rule-making record required by this rule need not constitute the exclusive basis for agency action on that rule.

**14.13(4) Maintenance of record.**

a. The lottery shall maintain the rule-making record for a period of not less than five years from the later of the date the rule to which it pertains became effective or the date of the Notice of Intended Action.

b. The lottery will maintain a separate file of any written criticism received regarding any of its rules for a period of not less than five years from the date the first written criticism for a rule was received as described in 14.13(2) "g," "h," "i," or "j."

**705—14.14(17A) Filing of rules.** The lottery shall file each rule it adopts in the office of the administrative rules coordinator. The filing must be executed as soon after adoption of the rule as is practicable. At the time of filing, each rule must have attached to it any fiscal impact statement and any concise statement of reasons that was issued with respect to that rule. If a fiscal impact statement or statement of reasons for that rule was not issued until a time subsequent to the filing of that rule, the note or statement must be attached to the filed rule within five working days after the note or statement is issued. In filing a rule, the lottery shall use the standard form prescribed by the administrative rules coordinator.

**705—14.15(17A) Effectiveness of rules prior to publication.**

**14.15(1) Grounds.** The lottery may make a rule effective after its filing at any stated time prior to 35 days after its indexing and publication in the Iowa Administrative Bulletin if it finds that a statute so provides, the rule confers a benefit or removes a restriction on some segment of the public, or that the effective date of the rule is necessary to avoid imminent peril to the public health, safety, or welfare. The lottery shall incorporate the required finding and a brief statement of its supporting reasons in each rule adopted in reliance upon this subrule.

**14.15(2) Special notice.** When the lottery makes a rule effective prior to its indexing and publication in reliance upon the provisions of Iowa Code section 17A.5(2)"b"(3), the lottery shall employ all reasonable efforts to make its contents known to the persons who may be affected by that rule prior to the rule's indexing and publication. The term "all reasonable efforts" requires the lottery to employ the most effective and prompt means of notice rationally calculated to inform potentially affected parties of the effectiveness of the rule that is justified and practical under the circumstances considering the various alternatives available for this purpose, the comparative costs to the lottery of utilizing each of those alternatives, and the harm suffered by affected persons from any lack of notice concerning the contents of the rule prior to its indexing and publication. The means that may be used for providing notice of such rules prior to their indexing and publication include, but are not limited to, any one or more of the following means: radio, newspaper, television, signs, mail, telephone, personal notice or electronic means.

A rule made effective prior to its indexing and publication in reliance upon the provisions of Iowa Code section 17A.5(2)"b"(3), shall include in that rule a statement describing the reasonable efforts that will be used to comply with the requirements of subrule 14.15(2).

**705—14.16(17A) General statements of policy.**

**14.16(1) Compilation, indexing, public inspection.** The lottery shall maintain an official, current, and dated compilation that is indexed by subject, containing all of its general statements of policy within the scope of Iowa Code section 17A.2(10)"a," "c," "f," "g," "h," "k." Each addition to, change in, or deletion from the official compilation must also be dated, indexed, and a record thereof kept. Except for those portions containing rules governed by Iowa Code section 17A.2(7)"f," or otherwise authorized by law to be kept confidential, the compilation must be made available for public inspection and copying.

**14.16(2) Enforcement of requirements.** A general statement of policy subject to the requirements of this subsection shall not be relied on by the lottery to the detriment of any person who does not have actual, timely knowledge of the contents of the statement until the requirements of subrule 14.16(1) are satisfied. This provision is inapplicable to the extent necessary to avoid imminent peril to the public health, safety, or welfare.

**705—14.17(17A) Review by agency of rules.**

**14.17(1) Any interested person, association, agency, or political subdivision may submit a written request to the administrative rules coordinator requesting the lottery to conduct a formal review of a specified rule.** Upon approval of that request by the administrative rules coordinator, the lottery shall conduct a formal review of a specified rule to determine whether a new rule should be adopted instead or the rule should be amended or repealed. The lottery may refuse to conduct a review if it has conducted such a review of the specified rule within five years prior to the filing of the written request.

**14.17(2) In conducting the formal review, the lottery shall prepare within a reasonable time a written report summarizing its findings, its supporting reasons, and any proposed course of action.** The report must include a concise statement of the lottery's findings regarding the rule's effectiveness in achieving its objectives, including a summary of any available supporting data. The report shall also concisely describe significant written criticisms of the rule received during the previous five years, including a summary of any petitions for waiver of the rule received by the lottery or granted by the lottery. The report shall describe alternative solutions to resolve the criticisms of the rule, the reasons any were rejected, and any changes made in the rule in response to the criticisms as well as the reasons for the changes. A copy of the lottery's report shall be sent to the administrative rules review committee and the administrative rules coordinator. The report must also be available for public inspection.

These rules are intended to implement Iowa Code chapter 17A as amended by 1998 Iowa acts, chapter 1202.

**ARC 8821A**

## MANAGEMENT DEPARTMENT[541]

### Notice of Intended Action

Twenty-five interested persons, a governmental subdivision, an agency or association of 25 or more persons may demand an oral presentation hereon as provided in Iowa Code section 17A.4(1)"b."

Notice is also given to the public that the Administrative Rules Review Committee may, on its own motion or on written request by any individual or group, review this proposed action under section 17A.8(6) at a regular or special meeting where the public or interested persons may be heard.

Pursuant to the authority of Iowa Code section 8.6(8), the Department of Management gives Notice of Intended Action

## MANAGEMENT DEPARTMENT[541](cont'd)

to rescind Chapter 6, "Declaratory Rulings," and to adopt a new Chapter 6, "Declaratory Orders," and to amend Chapter 7, "Agency Procedure for Rule Making," Iowa Administrative Code.

The proposed amendments bring the Department's rules on administrative rule making and declaratory orders into conformance with 1998 Iowa Acts, chapter 1202, which amended the Iowa Administrative Procedure Act.

The Department's proposed amendments to its rules are based on the amendments to the Uniform Rules on Agency Procedure drafted by a task force from the Attorney General's Office and published in the first volume of the Iowa Administrative Code and the Iowa Administrative Bulletin on February 24, 1999.

Interested persons may make written comments or suggestions on the proposed amendments on or before April 13, 1999. Written materials should be addressed to the Director, Department of Management, State Capitol, Room 12, Des Moines, Iowa 50319-0015, or faxed to (515)242-5897. E-mail may be sent to Ron.Amosson@idom.state.ia.us.

These amendments are intended to implement Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202, and Iowa Code section 25B.6.

The following amendments are proposed.

ITEM 1. Rescind 541—Chapter 6 and insert the following **new** 541—Chapter 6 in lieu thereof:

CHAPTER 6  
DECLARATORY ORDERS

The department of management incorporates the declaratory orders segment of the Uniform Rules on Agency Procedure which is printed in the first volume of the Iowa Administrative Code with the following amendments.

**541—6.1(17A) Petition for declaratory order.** In lieu of the words "(designate agency)", insert "department". In lieu of the words "(designate office)", insert "the Director's Office, Department of Management, State Capitol, Room 12, Des Moines, Iowa 50319-0015". In lieu of the words "(AGENCY NAME)", the heading on the petition form should read:

BEFORE THE DEPARTMENT OF MANAGEMENT

**541—6.2(17A) Notice of petition.** In lieu of the words "\_\_\_ days(15 or less)", insert "15 days". In lieu of the words "(designate agency)", insert "the department".

**541—6.3(17A) Intervention.**

**6.3(1)** In lieu of the words "within \_\_\_ days", insert "within 15 days". Strike the words "(after time for notice under X.2(17A))". In lieu of the number "X.8(17A)", insert "6.8(17A)".

**6.3(2)** In lieu of the words "(designate agency)", insert "the department".

**6.3(3)** In lieu of the words "(designate office)", insert "the Director's Office, Department of Management, State Capitol, Room 12, Des Moines, Iowa 50319-0015". In lieu of the words "(designate agency)", insert "department". In lieu of the words "(AGENCY NAME)", the heading on the petition form should read:

BEFORE THE DEPARTMENT OF MANAGEMENT

**541—6.4(17A) Briefs.** In lieu of the words "(designate agency)", insert "department".

**541—6.5(17A) Inquiries.** In lieu of the words "(designate official by full title and address)", insert "the Director, Department of Management, State Capitol, Room 12, Des Moines, Iowa 50319-0015".

**541—6.6(17A) Service and filing of petitions and other papers.**

**6.6(2)** In lieu of the words "(specify office and address)", insert "the Director's Office, Department of Management, State Capitol, Room 12, Des Moines, Iowa 50319-0015". In lieu of the words "(agency name)", insert "department".

**6.6(3)** In lieu of the words "(uniform rule on contested cases X.12(17A))", insert "rule 481—10.12(17A)".

**541—6.7(17A) Consideration.** In lieu of the words "(designate agency)", insert "department".

**541—6.8(17A) Action on petition.**

**6.8(1)** In lieu of the words "(designate agency head)", insert "director".

**6.8(2)** In lieu of the words "(contested case uniform rule X.2(17A))", insert "rule 481—10.1(10A)".

**541—6.9(17A) Refusal to issue order.**

**6.9(1)** In lieu of the words "(designate agency)", insert "department".

**541—6.12(17A) Effect of a declaratory order.** In lieu of the words "(designate agency)", insert "department".

These rules are intended to implement 1998 Iowa Acts, chapter 1202, section 13.

ITEM 2. Amend rule 541—7.5(17A) by inserting the following **new** subrule:

**7.5(5) Accessibility.** In lieu of the words "(designate office and telephone number)", insert "the department of management at (515)281-3322".

ITEM 3. Amend rule **541—7.6(17A)**, catchwords, by striking the word "flexibility" and by renumbering subrule **7.6(3)** as subrule **7.6(2)**.

ITEM 4. Add **new** rule 541—7.10(17A) as follows:

**541—7.10(17A) Exemptions from public rule-making procedures.**

**7.10(2) Categories exempt.** In lieu of the words "(List here narrowly drawn classes of rules where such an exemption is justified and a brief statement of the reasons for exempting each of them)", insert the following:

"a. Rules which are mandated by federal law or regulation in any situation where the department has no option but to adopt specified rules or where federal funding is contingent upon the adoption of the rules;

"b. Rules which implement recent legislation when a statute provides for an effective date which does not allow for the usual notice and public participation requirements;

"c. Rules which confer a benefit or remove a restriction on the public or some segment of the public;

"d. Rules which are necessary because of imminent peril to the public health, safety or welfare; and

"e. Nonsubstantive rules intended to correct typographical errors, incorrect citations, or other errors in existing rules."

ITEM 5. Amend **541—Chapter 7**, implementation clause, as follows:

These rules are intended to implement Iowa Code ~~section 8.6 and~~ chapter 17A as amended by 1998 Iowa Acts, chapter 1202, and Iowa Code section 25B.6.

**ARC 8857A****MEDICAL EXAMINERS  
BOARD[653]****Notice of Intended Action**

Twenty-five interested persons, a governmental subdivision, an agency or association of 25 or more persons may demand an oral presentation hereon as provided in Iowa Code section 17A.4(1)"b."

Notice is also given to the public that the Administrative Rules Review Committee may, on its own motion or on written request by any individual or group, review this proposed action under section 17A.8(6) at a regular or special meeting where the public or interested persons may be heard.

Pursuant to the authority of Iowa Code section 147.76, the Board of Medical Examiners gives Notice of Intended Action to adopt Chapter 2, "Impaired Physician Review Committee," to amend Chapter 10, "Medical Examiners," to rescind Chapter 12, "Discipline," and to adopt Chapter 12, "Mandatory Reporting and Grounds for Discipline," and Chapter 16, "Student Loan Default or Noncompliance," Iowa Administrative Code.

These amendments implement 1998 Iowa Acts, chapter 1202 [House File 667], which amends Iowa Code chapter 17A, the Iowa Administrative Procedure Act, and Iowa Code chapters 147, 148, 261, and 272C.

Any interested person may make written suggestions or comments on these proposed amendments on or before April 13, 1999. Such written comments should be directed to Executive Director, Board of Medical Examiners, Executive Hills West, 1209 East Court Avenue, Des Moines, Iowa 50319.

These amendments are intended to implement Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202, and chapters 147, 148, 261, and 272C.

The following amendments are proposed.

ITEM 1. Adopt the following new chapter:

**CHAPTER 2****IMPAIRED PHYSICIAN REVIEW COMMITTEE**

**653—2.1(272C) Impaired physician review committee.** Pursuant to the authority of Iowa Code section 272C.3(1)"k," the board establishes the impaired physician review committee.

**653—2.2(272C) Definitions.**

"Impaired physician recovery contract" or "contract" means the written document establishing the terms for participation in the impaired physician recovery program prepared by the impaired physician review committee.

"Impairment" means an inability to practice with reasonable safety and skill as a result of alcohol or drug abuse, dependency, or addiction, or any neuropsychiatric or physical disorder or disability.

"Initial agreement" means the written document establishing the initial terms for participation in the impaired physician recovery program.

"IPRC" or "committee" means the impaired physician review committee.

"IPRP" or "program" means the impaired physician recovery program.

"Self-report" means the licensee providing written or oral notification to the board that the licensee has been or may be diagnosed as having an impairment prior to the board's receiving a complaint or report alleging the same from a second party.

**653—2.3(272C) Purpose.** The impaired physician review committee evaluates, assists, monitors and, as necessary, makes reports to the board on the recovery or rehabilitation of physicians who self-report impairments.

**653—2.4(272C) Composition of the committee.** The chairperson of the board shall appoint the members of the IPRC. The membership of the IPRC includes, but is not limited to:

1. Executive director of the board or the director's designee from the board's staff;
2. One physician who has remained free of addiction for a period of no less than two years since successfully completing a board-approved recovery program and board-ordered probation for drug or alcohol dependency, addiction, or abuse;
3. One practitioner with expertise in substance abuse/addiction treatment programs;
4. One physician with expertise in the diagnosis and treatment of neuropsychiatric disorders and disabilities; and
5. One public member.

**653—2.5(272C) Eligibility.** To be eligible for participation in the impaired physician recovery program, a licensee must self-report an impairment or suspected impairment directly to the office of the board. A licensee is deemed ineligible to participate in the program if the board or committee finds evidence of any of the following:

1. The licensee engaged in the unlawful diversion or distribution of controlled substances or illegal substances to a third party or for personal profit or gain;
2. At the time of self-reporting, the licensee is already under board order for an impairment or any other violation of the laws and rules governing the practice of the profession;
3. The licensee has caused harm or injury to a patient;
4. There is currently a board investigation of the licensee that concerns serious matters related to the ability to practice with reasonable safety and skill or in accordance with the accepted standards of care;
5. The licensee has been subject to a civil administrative or criminal sanction, or ordered to make reparations or remuneration by a government or regulatory authority of the United States, this or any other state or territory or a foreign nation for actions that the committee determines to be serious infractions of the laws, administrative rules, or professional ethics related to the practice of medicine; or
6. The licensee failed to provide truthful information or to fully cooperate with the board or committee.

**653—2.6(272C) Type of program.** The impaired physician recovery program is an individualized recovery or rehabilitation program designed to meet the specific needs of the impaired physician. The committee, in consultation with the licensee and upon the recommendation of an IPRC-approved evaluator, shall determine the type of recovery or rehabilitation program required to treat the licensee's impairment. The committee shall prepare an impaired physician recovery contract, to be signed by the licensee, that shall provide a detailed description of the goals of the program, the requirements for successful completion, and the licensee's obligations therein.

**653—2.7(272C) Terms of participation.** A licensee shall agree to comply with the terms for participation in the IPRP established in the initial agreement and contract. Terms of participation specified in the contract shall include, but are not limited to:

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2.7(1) Duration. The length of time a licensee shall participate in the program shall be determined by the committee in accordance with the following:

a. Participation in the program for licensees impaired as a result of chemical dependency or alcohol or substance abuse or addiction is set at a minimum of four years.

b. Length of participation in the program for licensees with impairments resulting from neuropsychiatric or physical disorders or disabilities will vary depending upon the recommendations for treatment provided by a qualified evaluator designated by the committee to establish an appropriate treatment protocol.

2.7(2) Noncompliance. A licensee participating in the program is responsible for notifying the committee of any instance of noncompliance including, but not limited to, a relapse. Notification of noncompliance made to the IPRC by the licensee, any person responsible for providing or monitoring treatment, or another party shall result in the following:

a. First instance. Upon receiving notification of a first instance of noncompliance including, but not limited to, a relapse, the IPRC shall make a report to the board that includes recommendations as to whether treatment should be augmented or formal charges should be filed.

b. Second instance. Upon receiving notification of a second instance of noncompliance including, but not limited to, a relapse, the IPRC shall nullify the contract and refer the case to the board for the filing of formal charges or other appropriate action.

2.7(3) Practice restrictions. The IPRC may impose restrictions on the license to practice medicine as a term of the initial agreement or contract until such time as it receives a report from an approved evaluator that the licensee is capable of practicing with reasonable safety and skill. As a condition of participating in the program, a licensee is required to agree to restrict practice in accordance with the terms specified in the initial agreement or contract. In the event that the licensee refuses to agree to or comply with the restrictions established in the initial agreement or contract, the committee shall refer the licensee to the board for appropriate action.

653—2.8(272C) Limitations. The IPRC establishes the terms of and monitors a participant's compliance with the program specified in the initial agreement and contract. The IPRC is not responsible for participants who fail to comply with the terms of or successfully complete the IPRP. Participation in the program under the auspices of the IPRC shall not relieve the board of any duties and shall not divest the board of any authority or jurisdiction otherwise provided. Any violation of the statutes or rules governing the practice of medicine by a participant shall be referred to the board for appropriate action.

653—2.9(272C) Confidentiality. The IPRC is subject to the provisions governing confidentiality established in Iowa Code section 272C.6. Accordingly, information in the possession of the board or the committee about licensees in the program shall not be disclosed to the public. Participation in the IPRP under the auspices of the IPRC is not a matter of public record.

These rules are intended to implement Iowa Code section 272C.3.

ITEM 2. Rescind rule 653—10.10(17A) and adopt the following new rule in lieu thereof:

653—10.10(17A) Declaratory orders.

10.10(1) Petition for declaratory order. Any person may file a petition with the board of medical examiners for a declaratory order as to the applicability to specified circumstances of a statute, rule, or order within the primary jurisdiction of the Board of Medical Examiners, at 1209 East Court, Executive Hills West, Des Moines, Iowa 50319. A petition is deemed filed when it is received by that office. The board of medical examiners shall provide the petitioner with a file-stamped copy of the petition if the petitioner provides the agency an extra copy for this purpose. The petition must be typewritten or legibly handwritten in ink and must substantially conform to the following form:

BOARD OF MEDICAL EXAMINERS

Petition by (Name of Petitioner) for a Declaratory Order on (Cite provisions of law involved).



PETITION FOR DECLARATORY ORDER

The petition must provide the following information:

1. A clear and concise statement of all relevant facts on which the order is requested.

2. A citation and the relevant language of the specific statutes, rules, policies, decisions, or orders, whose applicability is questioned, and any other relevant law.

3. The questions petitioner wants answered, stated clearly and concisely.

4. The answers to the questions desired by the petitioner and a summary of the reasons urged by the petitioner in support of those answers.

5. The reasons for requesting the declaratory order and disclosure of the petitioner's interest in the outcome.

6. A statement indicating whether the petitioner is currently a party to another proceeding involving the questions at issue and whether, to the petitioner's knowledge, those questions have been decided by, are pending determination by, or are under investigation by, any governmental entity.

7. The names and addresses of other persons, or a description of any class of persons, known by petitioner to be affected by, or interested in, the questions presented in the petition.

8. Any request by petitioner for a meeting provided for by 10.10(7).

The petition must be dated and signed by the petitioner or the petitioner's representative. It must also include the name, mailing address, and telephone number of the petitioner and petitioner's representative, and a statement indicating the person to whom communications concerning the petition should be directed.

10.10(2) Notice of petition. Within 15 days after receipt of a petition for a declaratory order, the board of medical examiners shall give notice of the petition to all persons not served by the petitioner pursuant to 10.10(6)"c" to whom notice is required by any provision of law. The board of medical examiners may also give notice to any other persons.

10.10(3) Intervention.

a. Persons who qualify under any applicable provision of law as an intervenor and who file a petition for intervention within 20 days of the filing of a petition for declaratory order shall be allowed to intervene in a proceeding for a declaratory order.

b. Any person who files a petition for intervention at any time prior to the issuance of an order may be allowed to inter-

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vene in a proceeding for a declaratory order at the discretion of the board of medical examiners.

c. A petition for intervention shall be filed at 1209 East Court Avenue, Executive Hills West, Des Moines, Iowa 50319. Such a petition is deemed filed when it is received by that office. The board of medical examiners will provide the petitioner with a file-stamped copy of the petition for intervention if the petitioner provides an extra copy for this purpose. A petition for intervention must be typewritten or legibly handwritten in ink and must substantially conform to the following form:

BOARD OF MEDICAL EXAMINERS

Petition by (Name of Original Petitioner) for a Declaratory Order on (Cite provisions of law cited in original petition).	}	PETITION FOR INTERVENTION
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The petition for intervention must provide the following information:

1. Facts supporting the intervenor's standing and qualifications for intervention.
2. The answers urged by the intervenor to the question or questions presented and a summary of the reasons urged in support of those answers.
3. Reasons for requesting intervention and disclosure of the intervenor's interest in the outcome.
4. A statement indicating whether the intervenor is currently a party to any proceeding involving the questions at issue and whether, to the intervenor's knowledge, those questions have been decided by, are pending determination by, or are under investigation by, any governmental entity.
5. The names and addresses of any additional persons, or a description of any additional class of persons, known by the intervenor to be affected by, or interested in, the questions presented.
6. Whether the intervenor consents to be bound by the determination of the matters presented in the declaratory order proceeding.

The petition must be dated and signed by the intervenor or the intervenor's representative. It must also include the name, mailing address, and telephone number of the intervenor and intervenor's representative, and a statement indicating the person to whom communications should be directed.

**10.10(4) Briefs.** The petitioner or any intervenor may file a brief in support of the position urged. The board of medical examiners may request a brief from the petitioner, any intervenor, or any other person concerning the questions raised.

**10.10(5) Inquiries.** Inquiries concerning the status of a declaratory order proceeding may be made to the Executive Director, Board of Medical Examiners, 1209 East Court, Executive Hills West, Des Moines, Iowa 50319.

**10.10(6) Service and filing of petitions and other papers.**

a. When service required. Except where otherwise provided by law, every petition for declaratory order, petition for intervention, brief, or other paper filed in a proceeding for a declaratory order shall be served upon each of the parties of record to the proceeding, and on all other persons identified in the petition for declaratory order or petition for intervention as affected by or interested in the questions presented, simultaneously with their filing. The party filing a document is responsible for service on all parties and other affected or interested persons.

b. Filing—when required. All petitions for declaratory orders, petitions for intervention, briefs, or other papers in a proceeding for a declaratory order shall be filed with the Board of Medical Examiners, 1209 East Court, Executive Hills West, Des Moines, Iowa 50319. All petitions, briefs, or other papers that are required to be served upon a party shall be filed simultaneously with the board of medical examiners.

c. Method of service, time of filing, and proof of mailing. Method of service, time of filing, and proof of mailing shall be as provided by 653—12.19(17A).

**10.10(7) Consideration.** Upon request by petitioner, the board of medical examiners must schedule a brief and informal meeting between the original petitioner, all intervenors, and the board of medical examiners, a member of the board, or a member of the staff of the board, to discuss the questions raised. The board may solicit comments from any person on the questions raised. Also, comments on the questions raised may be submitted to the board by any person.

**10.10(8) Action on petition.**

a. Within the time allowed by 1998 Iowa Acts, chapter 1202, section 13(5), after receipt of a petition for a declaratory order, the board of medical examiners or designee shall take action on the petition as required by 1998 Iowa Acts, chapter 1202, section 13(5).

b. The date of issuance of an order or of a refusal to issue an order is as defined in 653—subrule 12.11(1).

**10.10(9) Refusal to issue order.**

a. The board of medical examiners shall not issue a declaratory order where prohibited by 1998 Iowa Acts, chapter 1202, section 13(1), and may refuse to issue a declaratory order on some or all questions raised for the following reasons:

- (1) The petition does not substantially comply with the required form.
- (2) The petition does not contain facts sufficient to demonstrate that the petitioner will be aggrieved or adversely affected by the failure of the board to issue an order.
- (3) The board does not have jurisdiction over the questions presented in the petition.
- (4) The questions presented by the petition are also presented in a current rule making, contested case, or other agency or judicial proceeding, that may definitively resolve them.

(5) The questions presented by the petition would more properly be resolved in a different type of proceeding or by another body with jurisdiction over the matter.

(6) The facts or questions presented in the petition are unclear, overbroad, insufficient, or otherwise inappropriate as a basis upon which to issue an order.

(7) There is no need to issue an order because the questions raised in the petition have been settled due to a change in circumstances.

(8) The petition is not based upon facts calculated to aid in the planning of future conduct but is, instead, based solely upon prior conduct in an effort to establish the effect of that conduct or to challenge an agency decision already made.

(9) The petition requests a declaratory order that would necessarily determine the legal rights, duties, or responsibilities of other persons who have not joined in the petition, intervened separately, or filed a similar petition and whose position on the questions presented may fairly be presumed to be adverse to that of petitioner.

(10) The petitioner requests the board to determine whether a statute is unconstitutional on its face.

b. A refusal to issue a declaratory order must indicate the specific grounds for the refusal and constitutes final agency action on the petition.

## MEDICAL EXAMINERS BOARD[653](cont'd)

c. Refusal to issue a declaratory order pursuant to this provision does not preclude the filing of a new petition that seeks to eliminate the grounds for the refusal to issue an order.

**10.10(10) Contents of declaratory order—effective date.** In addition to the order itself, a declaratory order must contain the date of its issuance, the name of petitioner and all intervenors, the specific statutes, rules, policies, decisions, or orders involved, the particular facts upon which it is based, and the reasons for its conclusion.

A declaratory order is effective on the date of issuance.

**10.10(11) Copies of orders.** A copy of all orders issued in response to a petition for a declaratory order shall be mailed promptly to the original petitioner and all intervenors.

**10.10(12) Effect of a declaratory order.** A declaratory order has the same status and binding effect as a final order issued in a contested case proceeding. It is binding on the board of medical examiners, the petitioner, and any intervenors who consent to be bound and is applicable only in circumstances where the relevant facts and the law involved are indistinguishable from those on which the order was based. As to all other persons, a declaratory order serves only as precedent and is not binding on the board of medical examiners. The issuance of a declaratory order constitutes final agency action on the petition.

ITEM 3. Rescind 653—Chapter 12 and adopt the following new chapter in lieu thereof:

CHAPTER 12  
MANDATORY REPORTING AND  
GROUND FOR DISCIPLINE

**653—12.1(272C) Mandatory reporting—judgments or settlements.** Each licensee, including licensees holding lapsed licenses, shall report to the board every adverse judgment in a malpractice action to which the licensee is a party and every settlement of claim against the licensee alleging malpractice. The report together with a copy of the judgment or settlement must be filed with the board within 30 days from the date of said judgment or settlement.

**653—12.2(272C) Mandatory reporting—wrongful acts or omissions.**

**12.2(1) Definitions.** For the purposes of this rule, the following definitions apply.

“Knowledge” means any information or evidence of reportable conduct acquired by personal observation, from a reliable or authoritative source, or under circumstances causing the licensee to believe that wrongful acts or omissions may have occurred.

“Reportable conduct” means wrongful acts or omissions that may constitute a basis for disciplinary action under this chapter or any state law or administrative rule that gives the board jurisdiction over the conduct of a licensee.

**12.2(2) Reporting requirement.** A report shall be filed with the board when a licensee has knowledge as defined in this rule that another person licensed by the board may have engaged in reportable conduct.

a. The report shall be filed with the board no later than 30 days from the date the licensee acquires knowledge of the reportable conduct.

b. The report shall contain the name and address of the licensee who may have engaged in the reportable conduct, the date, time, place and circumstances in which the conduct occurred, and a statement explaining how knowledge of the reportable conduct was acquired.

c. The final determination of whether or not wrongful acts or omissions have occurred is the responsibility of the board.

d. No licensee is required to report information deemed to be a confidential communication as a result of a physician-patient relationship or which is prohibited by state and federal statute.

**653—12.3(272C) Failure to report.** Failure to report knowledge of wrongful acts or omissions in accordance with rule 12.1(272C) or 12.2(272C) within the required 30-day period shall constitute a basis for disciplinary action against the licensee who failed to report.

**653—12.4(272C) Additional grounds for discipline.** The board has authority to impose discipline for any violation of Iowa Code chapter 147, 148 or 272C or the rules promulgated thereunder. The board may impose any of the disciplinary sanctions set forth in rule 12.33(272C), including civil penalties in an amount not to exceed \$10,000, when the board determines that the licensee is guilty of any of the following acts or offenses.

**12.4(1) Fraud in procuring a license.** Fraud in procuring a license includes, but is not limited to, an intentional perversion of the truth in making application for a license to practice medicine and surgery, osteopathic medicine and surgery or osteopathy in this state, and includes false representations of material fact, whether by word or by conduct, by false or misleading allegations, or by concealment of that which should have been disclosed when making application for a license in this state, or attempting to file or filing with the board any false or forged document submitted with an application for a license in this state.

**12.4(2) Professional incompetency.** Professional incompetency includes but is not limited to:

a. A substantial lack of knowledge or ability to discharge professional obligations within the scope of the physician's or surgeon's practice;

b. A substantial deviation by the physician from the standards of learning or skill ordinarily possessed and applied by other physicians or surgeons in the state of Iowa acting in the same or similar circumstances;

c. A failure by a physician or surgeon to exercise in a substantial respect that degree of care which is ordinarily exercised by the average physician or surgeon in the state of Iowa acting in the same or similar circumstances;

d. A willful or repeated departure from or the failure to conform to the minimal standard of acceptable and prevailing practice of medicine and surgery, osteopathic medicine and surgery or osteopathy in the state of Iowa.

**12.4(3) Knowingly making misleading, deceptive, untrue or fraudulent representations in the practice of a profession or engaging in unethical conduct or practice harmful or detrimental to the public.** Proof of actual injury need not be established.

a. Knowingly making misleading, deceptive, untrue or fraudulent representations in the practice of a profession includes, but is not limited to, an intentional perversion of the truth, either orally or in writing, by a physician in the practice of medicine and surgery, osteopathic medicine and surgery or osteopathy, and includes any representation contrary to the physician's legal or equitable duty, trust or confidence and is deemed by the board to be contrary to good conscience, prejudicial to the public welfare and may operate to the injury of another.

b. Engaging in unethical conduct includes, but is not limited to, a violation of the standards and principles of med-

## MEDICAL EXAMINERS BOARD[653](cont'd)

ical ethics and code of ethics set out in rules 653—13.10(147,148,272C) and 653—13.11(147,148, 272C), as interpreted by the board.

c. Practice harmful or detrimental to the public includes, but is not limited to, the failure of a physician to possess and exercise that degree of skill, learning and care expected of a reasonable, prudent physician acting in the same or similar circumstances in this state, or when a physician is unable to practice medicine with reasonable skill and safety to patients as a result of a mental or physical impairment or chemical abuse.

d. Practice harmful or detrimental to the public includes, but is not limited to, the use of a rubber stamp to affix a signature to a prescription. A person who is unable, due to a disability, to make a written signature or mark, however, may substitute in lieu of a signature a rubber stamp which is adopted by the disabled person for all purposes requiring a signature and which is affixed by the disabled person or affixed by another person upon the request of the disabled person and in the presence of the disabled person.

e. Practice harmful or detrimental to the public includes, but is not limited to, the practice of maintaining any prescribed prescription which is intended to be completed and issued at a later time.

**12.4(4)** Habitual intoxication or addiction to the use of drugs.

**12.4(5)** The inability of a physician to practice medicine and surgery, osteopathic medicine and surgery, or osteopathy with reasonable skill and safety by reason of illness; drunkenness; excessive use of alcohol, drugs, narcotics, chemicals or other type of material on a continuing basis; excessive use of alcohol, drugs, narcotics, chemicals or other type of material in a manner which may impair a physician's ability to practice the profession with reasonable skill and safety; or as a result of a mental or physical condition.

**12.4(6)** Being convicted of a felony in the courts of this state or another state, territory, or country, including the courts of the United States, as defined in Iowa Code section 148.6(2)"b."

**12.4(7)** Fraud in representations as to skill or ability. Fraud in representations as to skill or ability includes, but is not limited to, a physician having made misleading, deceptive or untrue representations as to the physician's competency to perform professional services for which the physician is not qualified to perform by training or experience.

**12.4(8)** Use of untruthful or improbable statements in advertisements. Use of untruthful or improbable statements in advertisement includes, but is not limited to, an action by a physician in making information or intention known to the public which is false, deceptive, misleading or promoted through fraud or misrepresentation and includes statements which may consist of, but are not limited to:

a. Inflated or unjustified expectations of favorable results.

b. Self-laudatory claims that imply that the physician is a skilled physician engaged in a field or specialty of practice for which the physician is not qualified.

c. Representations that are likely to cause the average person to misunderstand; or

d. Extravagant claims or claims of extraordinary skills not recognized by the medical profession.

**12.4(9)** Willful or repeated violations of the provisions of these rules or the provisions of Iowa Code chapters 147, 148, and 272C. Willful or repeated violations of the provisions of these rules and Iowa Code chapters 147, 148, and 272C include, but are not limited to, a physician's having intention-

ally or repeatedly violated a lawful rule or regulation promulgated by the board of medical examiners or violated a lawful order of the board in a disciplinary hearing or has violated the provisions of Title IV, Code of Iowa.

**12.4(10)** Violating a statute or law of this state, another state, or the United States, without regard to its designation as either felony or misdemeanor, which statute or law relates to the practice of medicine.

**12.4(11)** Failure to report a license revocation, suspension or other disciplinary action taken by a licensing authority of another state, an agency of the United States government, territory or other country within 30 days of the final action by such licensing authority. A stay by an appellate court shall not negate this requirement; however, if such disciplinary action is overturned or reversed by a court of last resort, such report shall be expunged from the records of the board.

**12.4(12)** Failure of a licensee or an applicant for licensure in this state to report any voluntary agreement to restrict the practice of medicine and surgery, osteopathic medicine and surgery or osteopathy entered into in another state, district, territory or country, including the United States.

**12.4(13)** Knowingly aiding, assisting, procuring, or advising a person to unlawfully practice medicine and surgery, osteopathic medicine and surgery or osteopathy.

**12.4(14)** Being guilty of a willful or repeated departure from, or the failure to conform to, the minimal standard of acceptable and prevailing practice of medicine and surgery, osteopathic medicine and surgery or osteopathy in which proceeding actual injury to a patient need not be established; or the committing by a physician of an act contrary to honesty, justice or good morals, whether the same is committed in the course of the physician's practice or otherwise, and whether committed within or without this state.

**12.4(15)** Willful or repeated violation of lawful rule or regulation adopted by the board.

**12.4(16)** Violating a lawful order of the board, previously entered by the board in a disciplinary or licensure hearing, or violating the terms and provisions of a consent agreement or informal settlement between a licensee and the board.

**12.4(17)** Being adjudged mentally incompetent by a court of competent jurisdiction. Such adjudication shall automatically suspend a license for the duration of the license unless the board orders otherwise.

**12.4(18)** Making suggestive, lewd, lascivious or improper remarks or advances to a patient.

**12.4(19)** Indiscriminately or promiscuously prescribing, administering or dispensing any drug for other than lawful purpose.

**12.4(20)** Knowingly submitting a false report of continuing education or failure to submit the annual report of continuing education.

**12.4(21)** Failure to notify the board within 30 days after occurrence of any judgment or settlement of a malpractice claim or action.

**12.4(22)** Failure to comply with a subpoena issued by the board.

**12.4(23)** Failure to file the reports required by rule 12.2(272C) concerning acts or omissions committed by another licensee.

**12.4(24)** Willful or repeated gross malpractice.

**12.4(25)** Willful or gross negligence.

**12.4(26)** Obtaining any fee by fraud or misrepresentation.

**12.4(27)** Failure to meet the acceptable and prevailing standard of care when delegating or supervising medical services provided by another physician, health care practitioner,

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or other individual who is collaborating with or acting as an agent, associate, or employee of the physician responsible for the patient's care, whether or not injury results.

**12.4(28)** Violating any of the grounds for the revocation or suspension of a license listed in Iowa Code section 147.55, 148.6 or 272C.10.

**12.4(29)** Failure to comply with the recommendations issued by the Centers for Disease Control of the United States Department of Health and Human Services for preventing transmission of human immunodeficiency virus and hepatitis B virus to patients during exposure-prone invasive procedures, or with the recommendations of the expert review panel established pursuant to Iowa Code section 139C.2(3), and applicable hospital protocols established pursuant to Iowa Code section 139C.2(1).

**12.4(30)** Noncompliance with a support order or with a written agreement for payment of support as evidenced by a certificate of noncompliance issued pursuant to Iowa Code chapter 252J. Disciplinary proceedings initiated under this subrule shall follow the procedures set forth in Iowa Code chapter 252J and 653—Chapter 15.

**12.4(31)** Student loan default or noncompliance with an agreement for payment of a student loan obligation as evidenced by a certificate of noncompliance issued pursuant to Iowa Code chapter 261 and rule 653—16.2(261).

**12.4(32)** Failure to transfer medical records to another physician in a timely fashion when legally requested to do so by the subject patient or by a legally designated representative of the subject patient.

**12.4(33)** Improper management of medical records, including failure to maintain timely, accurate, and complete medical records.

**12.4(34)** Failure to comply with an order of the board requiring a physician to submit to evaluation under Iowa Code section 148.6(2)“h” or 272C.9(1).

**12.4(35)** In a case which has been referred by the impaired physician review committee (IPRC) to the board, a violation of the terms of an initial agreement with the IPRC or an impaired physician recovery contract entered into with the IPRC.

**12.4(36)** Unprofessional conduct.

**653—12.5(17A,147,148,272C) Complaints.**

**12.5(1)** Form and content of the complaint. The complaint shall be made in writing, orally, or in any other form deemed acceptable by the board. A form provided by the board may be used. The form may be obtained from the office of the board upon request. The complaint shall contain the following information:

- a. The full name and address of the complainant except in instances in which the identity of the complainant is unknown.
- b. The full name, address and telephone number, if known, of the physician.
- c. A clear and accurate statement of the facts that fully apprises the board of the allegations against the physician.

**12.5(2)** Place and time of filing of the complaint. The complaint may be delivered in person, by telephone, other telecommunications or electronic devices, or by mail to the executive director of the board. The current office address is Board of Medical Examiners, 1209 East Court Avenue, Executive Hills West, Des Moines, Iowa 50319-0180.

Timely filing is required in order to ensure the availability of witnesses and to avoid initiation of an investigation under conditions which may have been significantly altered during the period of delay.

**12.5(3)** Complaints regarding physician supervision of physician assistants. Complaints received relating to physician supervision of physician assistants shall be copied or summarized and forwarded to the board of physician assistant examiners.

**12.5(4)** Immunities. A person shall not be civilly liable as a result of filing a report or complaint with the board or peer review committee, or for the disclosure to the board or its agents or employees, whether or not pursuant to a subpoena of records, documents, testimony or other forms of information which constitute privileged matter concerning a recipient of health care services or some other person, in connection with proceedings of a peer review committee, or in connection with duties of the board. However, such immunity from civil liability shall not apply if such act is done with malice.

## INVESTIGATIONS

**653—12.6(17A,147,148,272C) Investigations.**

**12.6(1)** Investigations. The board shall, upon receipt of a complaint, or upon its own motion, review and investigate alleged acts or omissions which the board reasonably believes constitute cause under applicable law or administrative rule for licensee discipline.

**12.6(2)** Investigation of allegations. For the board to determine if probable cause exists to commence a contested case proceeding, the executive director shall direct compliance staff to conduct an investigation of the allegations made in the complaint. The executive director may refer the complaint directly to a registered peer review committee or medical expert for investigation or consultation.

**12.6(3)** Prior to the commencement of a contested case proceeding, the licensee who is the subject of the complaint shall be contacted by the executive director, an investigator, a medical expert consulting with the agency, or peer review committee, and offered the opportunity to respond to the allegations made in the complaint. Contact with the licensee and the licensee's response to the allegations may be made in writing or through a personal interview or conference.

**12.6(4)** Issuance of investigatory subpoenas.

a. The board administrator or designee may, upon the written request of a board investigator or on the administrator's own initiative, subpoena books, papers, records, and other real evidence which is necessary for the board to decide whether to institute a contested case proceeding. In the case of a subpoena for mental health records, each of the following conditions shall be satisfied prior to the issuance of the subpoena:

- (1) The nature of the complaint reasonably justifies the issuance of a subpoena;
- (2) Adequate safeguards have been established to prevent unauthorized disclosure;
- (3) An express statutory mandate, articulated public policy, or other recognizable public interest favors access; and
- (4) An attempt was made to notify the patient and to secure an authorization from the patient for release of the records at issue.

b. A written request for a subpoena or the administrator's written memorandum in support of the issuance of a subpoena shall contain the following:

- (1) The name and address of the person to whom the subpoena will be directed;
- (2) A specific description of the books, papers, records or other real evidence requested;

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(3) An explanation of why the documents sought to be subpoenaed are necessary for the board to determine whether it should institute a contested case proceeding; and

(4) In the case of a subpoena request for mental health records, confirmation that the conditions described in 12.6(4)"a" have been satisfied.

c. Each subpoena shall contain:

(1) The name and address of the person to whom the subpoena is directed;

(2) A description of the books, papers, records or other real evidence requested;

(3) The date, time and location for production or inspection and copying;

(4) The time within which a motion to quash or modify the subpoena must be filed;

(5) The signature, address and telephone number of the board administrator or designee;

(6) The date of issuance;

(7) A return of service.

d. Any person who is aggrieved or adversely affected by compliance with the subpoena must, within 14 days after service of the subpoena, or before the time specified for compliance if such time is less than 14 days, file with the board a motion to quash or modify the subpoena. The motion shall describe the legal reasons why the subpoena should be quashed or modified and may be accompanied by legal briefs or factual affidavits.

e. Upon receipt of a timely motion to quash or modify a subpoena, the board may request an administrative law judge to hold a hearing and issue a decision, or the board may conduct a hearing and issue a decision. Oral argument may be scheduled at the discretion of the board or the administrative law judge. The administrative law judge or the board may quash or modify the subpoena, deny the motion, or issue an appropriate protective order.

f. A person aggrieved by a ruling of an administrative law judge who desires to challenge that ruling must appeal the ruling to the board by serving on the board's executive director, either in person or by certified mail, a notice of appeal within ten days after service of the decision of the administrative law judge.

g. If the person contesting the subpoena is not the person under investigation, the board's decision is final for purposes of judicial review. If the person contesting the subpoena is the person under investigation, the board's decision is not final for purposes of judicial review until either (1) the person is notified the investigation has been concluded with no formal action, or (2) there is a final decision in the contested case.

**12.6(5) Investigation report.** Upon completion of the investigation, the executive director or designee shall prepare a report for the board's consideration, which report shall set forth the information obtained in the course of the investigation, and the position or defense of the respondent.

**12.6(6) Review of investigations.**

a. Closure. If a determination is made by the board to close the case, the complainant and the physician who is the subject of the investigation shall be so notified by letter.

b. Further investigation. If the board determines the case shall be further investigated, it shall be returned to the investigator.

c. Peer review. The board may refer a case to a peer review committee for further review.

d. Appearance. The board or the physician may request that a physician appear before a committee of the board to discuss a pending investigation. By electing to participate in

the committee appearance, the physician waives any objection to a board member both participating in the appearance and later participating as a decision maker in a contested case proceeding. By electing to participate in the committee appearance, the physician further waives any objection to the executive director or director of compliance, if either is present at the appearance, from assisting the board in the contested case proceeding.

e. Informal letter. In the event the board concludes following investigation of a complaint that there is not probable cause for the filing of disciplinary charges, the board may issue the physician an informal letter of warning or education, which is not formal disciplinary action and not a public record.

f. Probable cause for disciplinary action. In the event the board finds following investigation of a complaint that there is probable cause for taking disciplinary action against a physician, the board shall order a contested case proceeding to be commenced by the filing of a statement of charges and notice of hearing.

g. Physician assistants. Prior to the initiation of formal disciplinary charges in a case involving the supervision of a physician assistant, the board shall, before initiating such action, forward a copy of the investigative report to the board of physician assistant examiners for its advice and recommendations. The board of physician assistant examiners shall respond within six weeks or sooner if the issues warrant it. The board shall consider the advice and recommendations of the board of physician assistant examiners.

**653—12.7(272C) Peer review committees.** The board may assign any case to a peer review committee for review and report to the board.

**12.7(1)** The board may establish and register peer review committees by keeping a current list of peer review members in the board office.

**12.7(2)** The board shall determine which peer review committee will review a case and what complaints or other matters shall be referred to a peer review committee for investigation, review, and report to the board.

**12.7(3)** The board may provide investigatory and related services to peer review committees upon request.

**12.7(4)** The peer review committees shall observe the requirements of confidentiality imposed by Iowa Code section 272C.6.

**12.7(5)** Members of the peer review committees shall not be liable for acts, omissions or decisions made in connection with service on the peer review committee. However, such immunity from civil liability shall not apply if such act is done with malice.

**12.7(6)** The peer review committees shall review the information provided by the board and make a written report to the board.

a. The written report shall contain a statement of facts, an opinion, and the rationale supporting the opinion.

b. The written report shall be signed by the members of the peer review committees concurring in the report.

c. If the peer review committee finds that it is unable to review the complaint, the complaint shall be returned together with an explanation to the board.

**653—12.8(272C) Doctor-patient privileged communications.** The privilege of confidential communication between the recipient and the provider of health care services shall not extend to afford confidentiality to medical records maintained by or on behalf of the subject of an investigation by the board, or records maintained by any public or private agency

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or organization, which relate to a matter under investigation by the board. No provision of Iowa Code section 622.10, except as it relates to an attorney of the licensee, or stenographer or confidential clerk of the attorney, shall be interpreted to restrict access by the board, its staff or agents to information sought in an investigation being conducted by the board.

**653—12.9(272C) Investigation of reports of judgments and settlements.** Reports received by the board from the commissioner of insurance, insurance carriers and licensees involving adverse judgments in a professional malpractice action, and settlement of claims alleging malpractice, which involve acts or omissions which constitute negligence, careless acts or omissions in the practice of medicine and surgery, osteopathic medicine and surgery or osteopathy, shall be reviewed and investigated by the board in the same manner as is prescribed in these rules for the review and investigation of written complaints.

**653—12.10(272C) Confidentiality of investigative files.** Complaint files, investigation files, and all other investigation reports and other investigative information in the possession of the board or peer review committee acting under the authority of the board or its employees or agents which relates to licensee discipline shall be privileged and confidential and shall not be subject to discovery, subpoena, or other means of legal compulsion for their release to any person other than the licensee and the board, its employees and agents involved in licensee discipline, or be admissible in evidence in any judicial or administrative proceeding other than the proceeding involving licensee discipline. However, a final settlement agreement or decision of the board in a contested case disciplinary proceeding shall be public record.

## DISCIPLINARY HEARING PROCEDURE

**653—12.11(17A) Scope and applicability.** These rules apply to contested case proceedings conducted by the board of medical examiners.

**12.11(1) Definitions.** Except where otherwise specifically defined by law:

“Contested case” means a proceeding defined by Iowa Code section 17A.2(5) and includes any matter defined as a no factual dispute contested case under 1998 Iowa Acts, chapter 1202, section 14.

“Issuance” means the date of mailing of a decision or order or date of delivery if service is by other means unless another date is specified in the order.

“Party” means the state of Iowa or the respondent.

“Presiding officer” means the board of medical examiners or a panel of the board. In a disciplinary contested case proceeding, the board may request that an administrative law judge make initial rulings on prehearing matters, and assist and advise the board in presiding at the disciplinary contested case hearing.

“Proposed decision” means a hearing panel’s recommended findings of fact, conclusions of law, decision, and order in a contested case in which the full board did not preside.

**12.11(2) Probable cause.** In the event the board finds there is probable cause for taking disciplinary action against a licensee following investigation of a complaint, the board shall order a contested case hearing be commenced by the filing of a statement of charges and notice of hearing.

**12.11(3) Legal review.** Every statement of charges and notice of hearing prepared by the board shall be reviewed by the office of the attorney general before they are filed.

**12.11(4) Time requirements.**

a. Time shall be computed as provided in Iowa Code subsection 4.1(34).

b. For good cause, the presiding officer may extend or shorten the time to take any action, except as precluded by statute or by rule. Except for good cause stated in the record, before extending or shortening the time to take any action, the presiding officer shall afford all parties an opportunity to be heard or to file written arguments.

**653—12.12(17A) Statement of charges and notice of hearing.**

**12.12(1) Delivery.** Delivery of the statement of charges and notice of hearing constitutes the commencement of the contested case proceeding. Delivery may be executed by:

a. Personal service as provided in the Iowa Rules of Civil Procedure; or

b. Restricted certified mail, return receipt requested; or

c. Publication, as provided in the Iowa Rules of Civil Procedure.

**12.12(2) Contents.** The statement of charges and notice of hearing shall contain the following information:

a. A statement of the time, place, and nature of the hearing;

b. A statement of the legal authority and jurisdiction under which the hearing is to be held;

c. A reference to the particular sections of the statutes and rules involved;

d. A short and plain statement of the matters asserted. This statement shall contain sufficient detail to give the respondent fair notice of the allegations so the respondent may adequately respond to the charges, and to give the public notice of the matters at issue;

e. A statement that the party may be represented by legal counsel at the party’s own expense;

f. Identification of all parties including the name, address and telephone number of the person who will act as advocate for the board or the state and of parties’ counsel where known;

g. Reference to the procedural rules governing conduct of the contested case proceeding;

h. Reference to the procedural rules governing informal settlement;

i. Identification of the board as the presiding officer;

j. A statement requiring the respondent to submit an answer pursuant to subrule 12.18(2) within 20 days after receipt of the notice of hearing; and

k. When applicable, notification of the time period in which a party may request pursuant to 1998 Iowa Acts, chapter 1202, section 15(1), and rule 12.15(17A), that the presiding officer be an administrative law judge.

**653—12.13(17A) Legal representation.** Following the filing of the statement of charges and notice of hearing, the office of the attorney general shall be responsible for the legal representation of the public interest in all proceedings before the board.

**653—12.14(17A) Presiding officer in a disciplinary contested case.** The presiding officer in a disciplinary contested case shall be the board or a panel of the board. However, the board may request that an administrative law judge assist the board with initial rulings on prehearing matters. Decisions of the administrative law judge serving in this capacity are subject to the interlocutory appeal provisions of rule 12.31(17A). In addition, an administrative law judge may assist and advise the board in presiding at the contested case hearing.

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**653—12.15(17A) Presiding officer in a nondisciplinary contested case.**

**12.15(1)** Any party in a nondisciplinary contested case who wishes to request that the presiding officer assigned to render a proposed decision be an administrative law judge employed by the department of inspections and appeals must file a written request within 20 days after service of a notice of hearing which identifies or describes the presiding officer as the board.

**12.15(2)** The board may deny the request only upon a finding that one or more of the following apply:

a. There is a compelling need to expedite issuance of a final decision in order to protect the public health, safety, or welfare.

b. An administrative law judge with the qualifications identified in 12.15(4) is unavailable to hear the case within a reasonable time.

c. The case involves significant policy issues of first impression that are inextricably intertwined with the factual issues presented.

d. The demeanor of the witnesses is likely to be dispositive in resolving the disputed factual issues.

e. Funds are unavailable to pay the costs of an administrative law judge and an interagency appeal.

f. The request was not timely filed.

g. The request is not consistent with a specified statute.

**12.15(3)** The board shall issue a written ruling specifying the grounds for its decision within 20 days after a request for an administrative law judge is filed. If the ruling is contingent upon the availability of an administrative law judge with the qualifications identified in 12.15(4), the parties shall be notified at least 10 days prior to hearing if a qualified administrative law judge will not be available.

**12.15(4)** An administrative law judge assigned to act as presiding officer in a nondisciplinary contested case shall have the following technical expertness unless waived by the agency: An administrative law judge shall have a J.D. degree.

**12.15(5)** Except as provided otherwise by another provision of law, all rulings by an administrative law judge acting as presiding officer in a nondisciplinary contested case are subject to appeal to the board. A party must seek any available intra-agency appeal in order to exhaust adequate administrative remedies. Such appeals must be filed within ten days of the date of the issuance of the challenged ruling, but no later than the time for compliance with the order or the date of hearing, whichever is first.

**12.15(6)** Unless otherwise provided by law, when reviewing a proposed decision of an administrative law judge in a nondisciplinary contested case upon intra-agency appeal, the board shall have the powers of and shall comply with the provisions of this chapter which apply to presiding officers.

**653—12.16(17A) Disqualification.**

**12.16(1)** A presiding officer or other person shall withdraw from participation in the making of any proposed or final decision in a contested case if that person:

a. Has a personal bias or prejudice concerning a party or a representative of a party;

b. Has personally investigated, prosecuted, or advocated in connection with that case, the specific controversy underlying that case, another pending factually related contested case, or a pending factually related controversy that may culminate in a contested case involving the same parties;

c. Is subject to the authority, direction or discretion of any person who has personally investigated, prosecuted or

advocated in connection with that contested case, the specific controversy underlying that contested case, or a pending factually related contested case or controversy involving the same parties;

d. Has acted as counsel to any person who is a private party to that proceeding within the past two years;

e. Has a personal financial interest in the outcome of the case or any other significant personal interest that could be substantially affected by the outcome of the case;

f. Has a spouse or relative within the third degree of relationship that:

(1) Is a party to the case, or an officer, director or trustee of a party;

(2) Is a lawyer in the case;

(3) Is known to have an interest that could be substantially affected by the outcome of the case; or

(4) Is likely to be a material witness in the case; or

g. Has any other legally sufficient cause to withdraw from participation in the decision making in that case.

**12.16(2)** The term "personally investigated" means taking affirmative steps to interview witnesses directly or to obtain documents or other information directly. The term "personally investigated" does not include:

a. General direction and supervision of assigned investigators;

b. Unsolicited receipt of information which is relayed to assigned investigators;

c. Review of another person's investigative work product in the course of determining whether there is probable cause to initiate a proceeding; or

d. Exposure to factual information while performing other agency functions, including fact gathering for purposes other than investigation of the matter which culminates in a contested case.

Factual information relevant to the merits of a contested case received by a person who later serves as presiding officer in that case shall be disclosed if required by Iowa Code section 17A.17(3) and subrules 12.16(3) and 12.29(9).

**12.16(3)** In a situation where a presiding officer or other person knows of information which might reasonably be deemed to be a basis for disqualification and decides voluntary withdrawal is unnecessary, that person shall submit the relevant information for the record by affidavit and shall provide for the record a statement of the reasons for the determination that withdrawal is unnecessary.

**12.16(4)** If a party asserts disqualification on any appropriate ground, including those listed in subrule 12.16(1), the party shall file a motion supported by an affidavit pursuant to 1998 Iowa Acts, chapter 1202, section 19(7). The motion must be filed as soon as practicable after the reason alleged in the motion becomes known to the party. The board shall determine the matter as part of the record in the case.

**653—12.17(17A) Consolidation—severance.**

**12.17(1)** Consolidation. The presiding officer may consolidate any or all matters at issue in two or more contested case proceedings where:

a. The matters at issue involve common parties or common questions of fact or law;

b. Consolidation would expedite and simplify consideration of the issues involved; and

c. Consolidation would not adversely affect the rights of any of the parties to those proceedings.

**12.17(2)** Severance. The presiding officer may, for good cause shown, order any contested case proceedings or portions thereof severed.

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**653—12.18(17A) Pleadings.**

**12.18(1)** Pleadings may be required by rule, by the notice of hearing, or by order of the presiding officer.

**12.18(2)** Answer. An answer shall be filed by the respondent within 20 days of service of the statement of charges and notice of hearing.

a. An answer shall show on whose behalf it is filed and specifically admit, deny, or otherwise answer all material allegations of the statement of charges. It shall state any facts deemed to show an affirmative defense and contain as many additional defenses as the respondent may claim.

b. An answer shall state the name, address and telephone number of the person filing the answer, the person or entity on whose behalf it is filed, and the attorney representing that person, if any.

c. Any allegation in the statement of charges not denied in the answer is considered admitted. The presiding officer may refuse to consider any defense not raised in the answer which could have been raised on the basis of facts known when the answer was filed if any party would be prejudiced.

**12.18(3)** Amendment. Amendments to the statement of charges and to an answer may be allowed with the consent of the parties or in the discretion of the presiding officer who may impose terms or grant a continuance.

**653—12.19(17A) Service and filing.**

**12.19(1)** Service—when required. Except where otherwise provided by law, every document filed in a contested case proceeding shall be served upon each of the parties of record to the proceeding, including the assistant attorney general designated as prosecutor for the state or the agency, simultaneously with their filing. Except for the original notice of hearing and an application for rehearing as provided in Iowa Code section 17A.16(2), the party filing a document is responsible for service on all parties.

**12.19(2)** Service—how made. Service upon a party represented by an attorney shall be made upon the attorney unless otherwise ordered. Service is made by delivery or by mailing a copy to the person's last-known address. Service by mail is complete upon mailing, except where otherwise specifically provided by statute, rule, or order.

**12.19(3)** Filing—when required. After the notice of hearing, all documents in a contested case proceeding shall be filed with the board. All documents that are required to be served upon a party shall be filed simultaneously with the board.

**12.19(4)** Filing—when made. Except where otherwise provided by law, a document is deemed filed at the time it is delivered to the Board of Medical Examiners, 1209 East Court Avenue, Executive Hills West, Des Moines, Iowa 50319, delivered to an established courier service for immediate delivery to that office, or mailed by first-class mail or state interoffice mail to that office, so long as there is proof of mailing.

**12.19(5)** Proof of mailing. Proof of mailing includes either:

- a. A legible United States Postal Service postmark on the envelope;
- b. A certificate of service;
- c. A notarized affidavit; or
- d. A certification in substantially the following form: I certify under penalty of perjury and pursuant to the laws of Iowa that, on (date of mailing), I mailed copies of (describe document) addressed to the Board of Medical Examiners, 1209 East Court Avenue, Executive Hills West, Des Moines, Iowa 50319, and to the names

and addresses of the parties listed below by depositing the same in (a United States post office mailbox with correct postage properly affixed or state interoffice mail).

(Date) (Signature)

## DISCOVERY

**653—12.20(17A) Discovery.**

**12.20(1)** Discovery procedures applicable in civil actions are applicable in contested cases. Unless lengthened or shortened by these rules or by order of the presiding officer, time periods for compliance with discovery shall be as provided in the Iowa Rules of Civil Procedure.

**12.20(2)** Any motion relating to discovery shall allege that the moving party has previously made a good-faith attempt to resolve the discovery issues involved with the opposing party. Motions in regard to discovery shall be ruled upon by the presiding officer. Opposing parties shall be afforded the opportunity to respond within ten days of the filing of the motion unless the time is shortened as provided in subrule 12.20(1). The presiding officer may rule on the basis of the written motion and any response, or may order argument on the motion.

**653—12.21(17A,272C) Subpoenas in a contested case.**

**12.21(1)** Subpoenas issued in a contested case may compel the attendance of witnesses at depositions or hearing, and may compel the production of books, papers, records, and other real evidence. A command to produce evidence or to permit inspection may be joined with a command to appear at deposition or hearing, or may be issued separately. Subpoenas shall be issued by the board administrator or designee upon written request. A request for a subpoena of mental health records must confirm the conditions described in 12.6(4)“a” have been satisfied prior to the issuance of the subpoena.

**12.21(2)** A request for a subpoena shall include the following information, as applicable, unless the subpoena is requested to compel testimony or documents for rebuttal or impeachment purposes:

- a. The name, address and telephone number of the person requesting the subpoena;
- b. The name and address of the person to whom the subpoena shall be directed;
- c. The date, time, and location at which the person shall be commanded to attend and give testimony;
- d. Whether the testimony is requested in connection with a deposition or hearing;
- e. A description of the books, papers, records or other real evidence requested;
- f. The date, time and location for production, or inspection and copying; and
- g. In the case of a subpoena request for mental health records, confirmation that the conditions described in 12.6(4)“a” have been satisfied.

**12.21(3)** Each subpoena shall contain, as applicable:

- a. The caption of the case;
- b. The name, address and telephone number of the person who requested the subpoena;
- c. The name and address of the person to whom the subpoena is directed;
- d. The date, time, and location at which the person is commanded to appear;
- e. Whether the testimony is commanded in connection with a deposition or hearing;

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- f. A description of the books, papers, records or other real evidence the person is commanded to produce;
- g. The date, time and location for production, or inspection and copying;
- h. The time within which a motion to quash or modify the subpoena must be filed;
- i. The signature, address and telephone number of the board administrator or designee;
- j. The date of issuance;
- k. A return of service.

**12.21(4)** Unless a subpoena is requested to compel testimony or documents for rebuttal or impeachment purposes, the board administrator or designee shall mail copies of all subpoenas to the parties to the contested case. The person who requested the subpoena is responsible for serving the subpoena upon the subject of the subpoena.

**12.21(5)** Any person who is aggrieved or adversely affected by compliance with the subpoena, or any party to the contested case who desires to challenge the subpoena must, within 14 days after service of the subpoena, or before the time specified for compliance if such time is less than 14 days, file with the board a motion to quash or modify the subpoena. The motion shall describe the legal reasons why the subpoena should be quashed or modified, and may be accompanied by legal briefs or factual affidavits.

**12.21(6)** Upon receipt of a timely motion to quash or modify a subpoena, the board may request an administrative law judge to hold a hearing and issue a decision, or the board may conduct the hearing and issue a decision. Oral argument may be scheduled at the discretion of the board or the administrative law judge. The administrative law judge or the board may quash or modify the subpoena, deny the motion, or issue an appropriate protective order.

**12.21(7)** A person aggrieved by a ruling of an administrative law judge who desires to challenge that ruling must appeal the ruling to the board by serving on the board's executive director, either in person or by certified mail, a notice of appeal within ten days after service of the decision of the administrative law judge.

**12.21(8)** If the person contesting the subpoena is not the person under investigation, the board's decision is final for purposes of judicial review. If the person contesting the subpoena is the person under investigation, the board's decision is not final for purposes of judicial review until there is a final decision in the contested case.

**653—12.22(17A) Motions.**

**12.22(1)** No technical form for motions is required. However, prehearing motions must be in writing, state the grounds for relief, and state the relief sought.

**12.22(2)** Any party may file a written response to a motion within ten days after the motion is served, unless the time period is extended or shortened by the presiding officer. The presiding officer may consider a failure to respond within the required time period in ruling on a motion.

**12.22(3)** The presiding officer may schedule oral argument on any motion.

**12.22(4)** Motions pertaining to the hearing must be filed and served at least ten days prior to the date of hearing unless there is good cause for permitting later action or the time for such action is lengthened or shortened by rule of the agency or an order of the presiding officer.

**653—12.23(17A) Prehearing conferences.**

**12.23(1)** Any party may request a prehearing conference. Prehearing conferences shall be conducted by the executive director, who may request the assistance of an administrative

law judge. A written request for prehearing conference or an order for prehearing conference on the executive director's own motion shall be filed prior to the contested case hearing, but no later than 20 days prior to the hearing date.

Written notice of the prehearing conference shall be given by the executive director to all parties. For good cause the executive director may permit variances from this rule.

**12.23(2)** The parties at a prehearing conference shall be prepared to discuss the following subjects, and the executive director or administrative law judge may issue appropriate orders concerning:

- a. The possibility of settlement.
- b. The entry of a scheduling order to include deadlines for completion of discovery.
- c. Stipulations of law or fact.
- d. Stipulations on the admissibility of exhibits.
- e. Submission of expert and other witness lists. Witness lists may be amended subsequent to the prehearing conference within the time limits established by the executive director or administrative law judge at the prehearing conference. Any such amendments must be served on all parties. Witnesses not listed on the final witness list may be excluded from testifying unless there was good cause for the failure to include their names.

f. Submission of exhibit lists. Exhibit lists may be amended subsequent to the prehearing conference within the time limits established by the executive director or administrative law judge at the prehearing conference. Exhibits other than rebuttal exhibits that are not listed on the final exhibit list may be excluded from admission into evidence unless there was good cause for the failure to include them.

- g. Stipulations for waiver of any provision of law.
- h. Identification of matters which the parties intend to request be officially noticed.
- i. Consideration of any additional matters which will expedite the hearing.

**12.23(3)** Prehearing conferences may be conducted by telephone unless otherwise ordered.

**653—12.24(17A) Continuances.** Unless otherwise provided, applications for continuances shall be filed with the board. In the event the application for continuance is not contested, the executive director shall serve as presiding officer and issue the appropriate order. In the event the application for continuance is contested, the matter shall be heard by the board as presiding officer or may be delegated by the board to an administrative law judge. Within seven days of the date set for hearing, no continuances shall be granted except for extraordinary, extenuating or emergency circumstances.

**12.24(1)** A written application for a continuance shall:

- a. Be made at the earliest possible time and no less than five working days before the hearing except in case of unanticipated emergencies;
- b. State the specific reasons for the request; and
- c. Be signed by the requesting party or the party's representative.

An oral application for a continuance may be made if the presiding officer waives the requirement for a written motion. However, a party making such an oral application for a continuance must confirm that request by written application within two days after the oral request unless that requirement is waived by the presiding officer. No application for continuance shall be made or granted without notice to all parties except in an emergency where notice is not feasible.

**12.24(2)** In determining whether to grant a continuance, the presiding officer may consider:

- a. Prior continuances;

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- b. The interests of all parties;
- c. The public interest;
- d. The likelihood of informal settlement;
- e. The existence of an emergency;
- f. Any objection;
- g. Any applicable time requirements;
- h. The existence of a conflict in the schedules of counsel, parties, or witnesses;
- i. The timeliness of the request; and
- j. Other relevant factors.

The presiding officer may require documentation of any grounds for continuance.

**653—12.25(272C) Settlements.**

**12.25(1)** A contested case may be resolved by informal settlement. Settlement negotiations may be initiated at any stage of a contested case by the executive director, prosecuting attorney, or the respondent. No party is required to participate in the informal settlement process. The executive director and chairperson of the board, or the chairperson's designee, shall have authority to negotiate on behalf of the board.

**12.25(2)** The full board shall not be involved in negotiation until a written proposed settlement is submitted to the full board for approval, unless both parties waive this prohibition.

**12.25(3)** Consent to negotiation by the respondent during informal settlement negotiation constitutes a waiver of notice and opportunity to be heard pursuant to Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202, section 19. Thereafter, the prosecuting attorney is authorized to discuss informal settlement with the board chairperson or designee.

**12.25(4)** Negotiations for a proposed settlement shall be completed at least seven days prior to the date scheduled for hearing. However, after consultation with the board chairperson or designee, the executive director shall have the power to grant additional time for continued negotiations in instances where additional time will likely lead to a satisfactory settlement prior to the hearing date.

**653—12.26(17A) Hearing procedures.**

**12.26(1)** A hearing may be conducted before the board or a panel of not less than three members of the board at least two of whom are licensed by the board.

**12.26(2)** When, in the opinion of a majority of the board, it is desirable to obtain specialists within an area of practice when holding disciplinary hearings, the board may appoint a panel of three specialists who are not board members to make findings of fact and to report to the board. Such findings shall not include any recommendation for or against licensee discipline.

**12.26(3)** The presiding officer shall have the authority to administer oaths, to admit or exclude testimony or other evidence, and to rule on all motions and objections. The presiding officer may request that an administrative law judge perform any of these functions, and may be assisted and advised by an administrative law judge.

**12.26(4)** All objections shall be timely made and stated on the record.

**12.26(5)** Parties have the right to participate or to be represented in all hearings or prehearing conferences related to their case. Any party may be represented by an attorney at the party's own expense.

**12.26(6)** Subject to terms and conditions prescribed by the presiding officer, parties have the right to introduce evidence on issues of material fact, cross-examine witnesses

present at the hearing as necessary for a full and true disclosure of the facts, present evidence in rebuttal, and submit briefs and engage in oral argument.

**12.26(7)** The presiding officer shall maintain the decorum of the hearing and may refuse to admit or may expel anyone whose conduct is disorderly.

**12.26(8)** Witnesses may be sequestered during the hearing.

**12.26(9)** The presiding officer shall have authority to grant immunity from disciplinary action to a witness as provided by Iowa Code section 272C.6(3).

**12.26(10)** The presiding officer shall conduct the hearing in the following manner:

a. The presiding officer shall give an opening statement briefly describing the nature of the proceedings;

b. The parties shall be given an opportunity to present opening statements;

c. The parties shall present their cases in the sequence determined by the presiding officer;

d. Each witness shall be sworn or affirmed by the presiding officer or the court reporter, and be subject to examination and cross-examination. The presiding officer may limit questioning in a manner consistent with law;

e. When all parties and witnesses have been heard, the parties may be given the opportunity to present final arguments.

**12.26(11)** The board members and administrative law judge have the right to question a witness. Examination of witnesses by board members is subject to properly raised objections.

**12.26(12)** The hearing shall be open to the public unless the licensee requests that the hearing be closed.

**653—12.27(17A) Evidence.**

**12.27(1)** The presiding officer shall rule on admissibility of evidence and may, where appropriate, take official notice of facts in accordance with all applicable requirements of law.

**12.27(2)** Stipulation of facts is encouraged. The presiding officer may make a decision based on stipulated facts.

**12.27(3)** Evidence in the proceeding shall be confined to the issues as to which the parties received notice prior to the hearing unless the parties waive their right to such notice or the presiding officer determines that good cause justifies expansion of the issues. If the presiding officer decides to admit evidence on issues outside the scope of the notice over the objection of a party who did not have actual notice of those issues, that party, upon timely request, shall receive a continuance sufficient to amend pleadings and to prepare on the additional issue.

**12.27(4)** The party seeking admission of an exhibit must provide opposing parties with an opportunity to examine the exhibit prior to the ruling on its admissibility. Copies of documents should normally be provided to opposing parties.

All exhibits admitted into evidence shall be appropriately marked and be made part of the record.

**12.27(5)** Any party may object to specific evidence or may request limits on the scope of any examination or cross-examination. Such an objection shall be accompanied by a brief statement of the grounds upon which it is based. The objection, the ruling on the objection, and the reasons for the ruling shall be noted in the record. The presiding officer may rule on the objection at the time it is made or may reserve a ruling until the written decision.

**12.27(6)** Whenever evidence is ruled inadmissible, the party offering that evidence may submit an offer of proof on the record. The party making the offer of proof for excluded

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oral testimony shall briefly summarize the testimony or, with permission of the presiding officer, present the testimony. If the excluded evidence consists of a document or exhibit, it shall be marked as part of an offer of proof and inserted in the record.

**653—12.28(17A) Default.**

**12.28(1)** If a party fails to appear or participate in a contested case proceeding after proper service of notice, the presiding officer may, if no adjournment is granted, enter a default decision or proceed with the hearing and render a decision in the absence of the party.

**12.28(2)** Where appropriate and not contrary to law, any party may move for default against a party who has failed to appear after proper service.

**12.28(3)** Default decisions or decisions rendered on the merits after a party has failed to appear or participate in a contested case proceeding become final agency action unless, within 15 days after the date of notification or mailing of the decision, a motion to vacate is filed and served on all parties or an appeal of a decision on the merits is timely initiated within the time provided by 12.32(2). A motion to vacate must state all facts relied upon by the moving party which establish that good cause existed for that party's failure to appear or participate at the contested case proceeding. Each fact so stated must be substantiated by at least one sworn affidavit of a person with personal knowledge of each such fact, which affidavit(s) must be attached to the motion.

**12.28(4)** The time for further appeal of a decision for which a timely motion to vacate has been filed is stayed pending a decision on the motion to vacate.

**12.28(5)** Properly substantiated and timely filed motions to vacate shall be granted only for good cause shown. The burden of proof as to good cause is on the moving party. Adverse parties shall have ten days to respond to a motion to vacate. Adverse parties shall be allowed to conduct discovery as to the issue of good cause and to present evidence on the issue prior to a decision on the motion, if a request to do so is included in that party's response.

**12.28(6)** "Good cause" for purposes of this rule shall have the same meaning as "good cause" for setting aside a default judgment under Iowa Rule of Civil Procedure 236.

**12.28(7)** A decision denying a motion to vacate is subject to further appeal within the time limit allowed for further appeal of a decision on the merits in the contested case proceeding. A decision granting a motion to vacate is subject to interlocutory appeal by the adverse party pursuant to rule 12.31(17A).

**12.28(8)** If a motion to vacate is granted and no timely interlocutory appeal has been taken, the presiding officer shall issue another notice of hearing and the contested case shall proceed accordingly.

**12.28(9)** A default decision may provide either that the default decision is to be stayed pending a timely motion to vacate or that the default decision is to take effect immediately, subject to a request for stay under rule 12.35(17A).

**653—12.29(17A) Ex parte communication.**

**12.29(1)** Prohibited communications. Unless required for the disposition of ex parte matters specifically authorized by statute, following issuance of the notice of hearing, there shall be no communication, directly or indirectly, between the presiding officer and any party or representative of any party or any other person with a direct or indirect interest in such case in connection with any issue of fact or law in the case except upon notice and opportunity for all parties to participate. Nothing in this provision is intended to preclude

board members from communicating with other board members or members of the board staff, other than those with a personal interest in, or those engaged in personally investigating as defined in subrule 12.16(2), prosecuting, or advocating in, either the case under consideration or a pending factually related case involving the same parties, as long as those persons do not directly or indirectly communicate to the presiding officer any ex parte communications they have received of a type that the presiding officer would be prohibited from receiving or that furnish, augment, diminish, or modify the evidence in the record.

**12.29(2)** Prohibitions on ex parte communications commence with the issuance of the notice of hearing in a contested case and continue for as long as the case is pending before the board.

**12.29(3)** Written, oral or other forms of communication are "ex parte" if made without notice and opportunity for all parties to participate.

**12.29(4)** To avoid prohibited ex parte communications notice must be given in a manner reasonably calculated to give all parties a fair opportunity to participate. Notice of written communications shall be provided in compliance with 12.19(17A) and may be supplemented by telephone, facsimile, electronic mail or other means of notification. Where permitted, oral communications may be initiated through conference telephone call including all parties or their representatives.

**12.29(5)** Persons who jointly act as presiding officer in a pending contested case may communicate with each other without notice or opportunity for parties to participate.

**12.29(6)** The executive director or other persons may be present in deliberations or otherwise advise the presiding officer without notice or opportunity for parties to participate as long as they are not disqualified from participating in the making of a proposed or final decision under any provision of law and they comply with rule 12.16(17A).

**12.29(7)** Communications with the presiding officer involving uncontested scheduling or procedural matters do not require notice or opportunity for parties to participate. Parties should notify other parties prior to initiating such contact with the presiding officer when feasible, and shall notify other parties when seeking to continue hearings or other deadlines pursuant to rule 12.24(17A).

**12.29(8)** Disclosure of prohibited communications. A presiding officer who receives a prohibited ex parte communication during the pendency of a contested case must initially determine if the effect of the communication is so prejudicial that the presiding officer should be disqualified.

a. If the presiding officer determines that disqualification is warranted, a copy of any prohibited written communication, all written responses to the communication, a written summary stating the substance of any prohibited oral or other communication not available in written form for disclosure, all responses made, and the identity of each person from whom the presiding officer received a prohibited ex parte communication shall be submitted for inclusion in the record under seal by protective order; or

b. If the presiding officer determines that disqualification is not warranted, such documents shall be submitted for inclusion in the record and served on all parties. Any party desiring to rebut the prohibited communication must be allowed the opportunity to do so upon written request filed within ten days after notice of the communication.

**12.29(9)** Promptly after being assigned to serve as presiding officer at any stage in a contested case proceeding, a presiding officer shall disclose to all parties material factual in-

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formation received through ex parte communication prior to such assignment, unless the factual information has already been or shortly will be disclosed pursuant to Iowa Code section 17A.13(2) or through discovery. Factual information contained in an investigative report or similar document need not be separately disclosed by the presiding officer as long as such documents have been or will shortly be provided to the parties.

**12.29(10)** The presiding officer may render a proposed or final decision imposing appropriate sanctions for violations of this rule including default, a decision against the offending party, censure, suspension or revocation of the privilege to practice before the board. Violation of ex parte communication prohibitions by board personnel shall be reported to the board and its executive director for possible sanctions including censure, suspension, dismissal, or other disciplinary action.

**653—12.30(17A) Recording costs.** Upon request, the board shall provide a copy of the whole or any portion of the record at cost. The cost of preparing a copy of the record or of transcribing the hearing record shall be paid by the requesting party.

**653—12.31(17A) Interlocutory appeals.** Upon written request of a party or on its own motion, the board may review an interlocutory order of the executive director, administrative law judge, or hearing panel. In determining whether to do so, the board shall consider:

**12.31(1)** The extent to which its granting the interlocutory appeal would expedite final resolution of the case;

**12.31(2)** And the extent to which review of that interlocutory order by the board at the time it reviews the proposed decision of the presiding officer would provide an adequate remedy.

Any request for interlocutory review must be filed within 14 days of issuance of the challenged order, but no later than the time for compliance with the order or the date of hearing, whichever is first.

**653—12.32(17A) Decisions.**

**12.32(1) Final decisions.** When six or more members of the board preside over the reception of the evidence at the hearing, its decision is a final decision.

a. When a panel of three specialists presides over the reception of the evidence at the hearing, a transcript of the proceedings, together with exhibits presented and the findings of fact of the panel shall be considered by the board at the earliest practicable time. The parties shall have the opportunity to appear personally to present argument to the board. The decision of the board is a final decision.

b. If the hearing is conducted by a three-member hearing panel, the decision is a proposed decision and subject to the review provisions of 12.32(2).

c. Confidentiality. At no time prior to the release of the final decision by the board shall any portion or the whole thereof be made public or be distributed to any persons other than the parties.

**12.32(2) Proposed decision—appeal to board.** A proposed decision of a board hearing panel becomes a final decision unless appealed in accordance with the following procedure:

a. A proposed decision may be appealed to the board by serving on the executive director, either in person or by certified mail, a notice of appeal within 30 days after service of the proposed decision on the appealing party.

b. The board may review a proposed decision or order on its own motion by serving notice on all parties within 30

days of a proposed decision rendered in accordance with subrule.

c. Following receipt of a notice of appeal, the board shall enter an order establishing a briefing schedule. The parties shall serve their briefs on the board and shall furnish an additional copy to each party by first-class mail.

d. Oral argument of the appeal is discretionary but may be required by the board upon its own motion. At the times designated for filing briefs and arguments either party may request oral argument. If a request for oral argument is granted, or if required by the board, the executive director shall notify all parties of the date, time and place.

e. The record on appeal shall be the entire record made before the hearing panel or administrative hearing officer.

f. Requests to present additional evidence. A party may request the taking of additional evidence only by establishing that:

(1) The facts or other evidence arose after the original proceeding, or

(2) The party offering such evidence could not reasonably have provided such evidence at the original proceedings, or

(3) The party offering the additional evidence was misled by any party as to the necessity for offering such evidence at the original proceeding.

A written request to present additional evidence must be filed with the notice of appeal or, by a nonappealing party, within 14 days of service of the notice of appeal. The board may remand a case to the hearing panel for further hearing or may itself preside at the taking of additional evidence.

**653—12.33(272C) Disciplinary sanctions.**

**12.33(1)** If the board concludes following a contested case hearing that discipline is warranted, the board has authority to impose any of the following disciplinary sanctions:

a. Revocation of license.

b. Suspension of license until further order of the board or for a specified period.

c. Prohibit permanently, until further order of the board or for a specified period, the engaging in specified procedures, methods or acts.

d. Probation with imposition of appropriate term and conditions.

e. Require additional education or training.

f. Require reexamination.

g. Order a physical or mental examination, or order alcohol or drug screening within a time specified by the board.

h. Impose civil penalties not to exceed \$10,000.

i. Issue a citation and warning.

j. Such other sanctions allowed by law as may be appropriate.

**12.33(2)** At the discretion of the board, the following factors may be considered by the board in determining the nature and severity of the disciplinary sanction to be imposed:

a. The relative seriousness of the violation as it relates to assuring the citizens of this state a high standard of professional care.

b. The facts of the particular violation.

c. Any extenuating circumstances or other countervailing considerations.

d. Number of prior violations or complaints.

e. Seriousness of prior violations or complaints.

f. Whether remedial action has been taken.

g. Such other factors as may reflect upon the competency, ethical standards and professional conduct of the licensee.

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**653—12.34(17A) Applications for rehearing.**

**12.34(1)** By whom filed. Any party to a contested case proceeding may file an application for rehearing from a final order.

**12.34(2)** Content of application. The application for rehearing shall state on whose behalf it is filed, the specific grounds for rehearing, and the relief sought. In addition, the application shall state whether the applicant desires reconsideration of all or part of the agency decision on the existing record and whether, on the basis of the grounds enumerated in 12.32(2)"f" and 12.34(5), the applicant requests an opportunity to submit additional evidence.

**12.34(3)** Time of filing. The application shall be filed with the board within 20 days after issuance of the final decision.

**12.34(4)** Notice to other parties. A copy of the application shall be timely mailed by the applicant to all parties of record not joining therein.

**12.34(5)** Additional evidence. A request that additional evidence be considered on rehearing shall be governed by 12.32(2)"f."

**12.34(6)** Disposition. Any application for a rehearing shall be deemed denied unless the agency grants the application within 20 days after its filing.

**653—12.35(17A) Stays of agency actions.**

**12.35(1)** When available. Any party to a contested case proceeding may petition the board for a stay of an order issued in that proceeding or for other temporary remedies, pending review by the board or pending judicial review. The petition shall state the reasons justifying a stay or other temporary remedy.

**12.35(2)** When granted. In determining whether to grant a stay, the board shall consider the factors listed in 1998 Iowa Acts, chapter 1202, section 23(5c). The board shall not grant a stay in any case in which the district court would be expressly prohibited by statute from granting a stay.

**653—12.36(17A) No factual dispute contested cases.** If the parties agree that no dispute of material fact exists as to a matter that would be a contested case if such a dispute of fact existed, the parties may present all relevant admissible evidence either by stipulation or otherwise as agreed by the parties, without necessity for the production of evidence at an evidentiary hearing. If such agreement is reached, a jointly submitted schedule detailing the method and timetable for submission of the record, briefs and oral argument should be submitted to the presiding officer for approval as soon as practicable.

**653—12.37(17A) Emergency adjudicative proceedings.**

**12.37(1)** Necessary emergency action. To the extent necessary to prevent or avoid immediate danger to the public health, safety, or welfare, and consistent with the Constitution and other provisions of law, the board may issue a written order in compliance with Iowa Code section 17A.18 to suspend a license in whole or in part, order the cessation of any continuing activity, order affirmative action, or take other action within the jurisdiction of the board by emergency adjudicative order. Before issuing an emergency adjudicative order the board shall consider factors including, but not limited to, the following:

a. Whether there has been a sufficient factual investigation to ensure that the board is proceeding on the basis of reliable information;

b. Whether the specific circumstances which pose immediate danger to the public health, safety or welfare have been identified and determined to be continuing;

c. Whether the person required to comply with the emergency adjudicative order may continue to engage in other activities without posing immediate danger to the public health, safety or welfare;

d. Whether imposition of monitoring requirements or other interim safeguards would be sufficient to protect the public health, safety or welfare; and

e. Whether the specific action contemplated by the board is necessary to avoid the immediate danger.

**12.37(2) Issuance of order.**

a. An emergency adjudicative order shall contain findings of fact, conclusions of law, and policy reasons to justify the determination of an immediate danger in the board's decision to take immediate action. The order is a public record.

b. The written emergency adjudicative order shall be immediately delivered to the person who is required to comply with the order by utilizing one or more of the following procedures:

(1) Personal delivery;

(2) Certified mail, return receipt requested, to the last address on file with the agency;

(3) Certified mail to the last address on file with the agency; or

(4) Fax. Fax may be used as the sole method of delivery if the person required to comply with the order has filed a written request that agency orders be sent by fax and has provided a fax number for that purpose.

c. To the degree practicable, the board shall select the procedure for providing written notice that best ensures prompt, reliable delivery.

**12.37(3)** Oral notice. Unless the written emergency adjudicative order is provided by personal delivery on the same day that the order issues, the board shall make reasonable immediate efforts to contact by telephone the person who is required to comply with the order.

**12.37(4)** Completion of proceedings. After the issuance of an emergency adjudicative order, the board shall proceed as quickly as feasible to complete any proceedings that would be required if the matter did not involve an immediate danger.

Issuance of a written emergency adjudicative order shall include notification of the date on which board proceedings are scheduled for completion. After issuance of an emergency adjudicative order, continuance of further agency proceedings to a later date will be granted only in compelling circumstances upon application in writing unless the person who is required to comply with the order is the party requesting the continuance.

**653—12.38(17A) Judicial review and appeal.** Judicial review of the board's action may be sought in accordance with the terms of the Iowa administrative procedure Act, from and after the date of the director's order.

**653—12.39(17A) Publication of decisions.** Final decisions of the board relating to disciplinary procedures shall be transmitted to the appropriate professional association(s), Federation of State Medical Boards, and a newspaper(s) of general circulation to be selected by the board.

**653—12.40(17A) Reinstatement.** Any person whose license to practice medicine and surgery, osteopathic medicine and surgery or osteopathy, has been revoked, or suspended by the board, may apply to the board for reinstatement in accordance with the terms and conditions of the order of revocation or suspension.

**12.40(1)** If the order of revocation or suspension did not establish terms and conditions upon which reinstatement

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might occur, or if the license was voluntarily surrendered, an initial application for reinstatement may not be made until one year has elapsed from the date of the director's order or the date of voluntary surrender.

**12.40(2)** All proceedings for reinstatement shall be initiated by the respondent, who shall file with the board an application for the reinstatement of the respondent's license. Such application shall be docketed in the original case in which the license was revoked, suspended, or relinquished. All proceedings upon the petition for reinstatement shall be subject to the same rules of procedure as other cases before the board.

**12.40(3)** An application for reinstatement shall allege facts which, if established, will be sufficient to enable the board to determine that the basis for the revocation or suspension of the respondent's license no longer exists and that it will be in the public interest for the license to be reinstated. The burden of proof to establish such facts shall be on the respondent.

**12.40(4)** An order of reinstatement shall be based upon a decision which incorporates findings of facts and conclusions of law, and must be based upon the affirmative vote of not fewer than six members of the board. The order of reinstatement shall be published as provided for in 12.39(17A).

**653—12.41(17A) License denial.** A decision of the board denying an application for licensure shall be appealed by filing a written notice of appeal with the board by certified mail, return receipt requested, within 30 days of a mailing of a notice of denial of license. The appeal of a license denial shall be conducted in accordance with the contested case hearing rules of this chapter.

**653—12.42(17A) Appeal of a contested case.** An appeal of a contested case decision taken pursuant to the provisions of Iowa Code section 148C.6A by a physician assistant involving discipline of the physician assistant shall be conducted pursuant to the provisions of rule 12.32(17A).

**653—12.43(272C) Disciplinary hearings—fees and costs.**

**12.43(1) Definitions.** As used in this rule in relation to a formal disciplinary action filed by the board against a licensee:

“Deposition” means the testimony of a person taken pursuant to subpoena or at the request of the state of Iowa taken in a setting other than a hearing.

“Expenses” means costs incurred by persons appearing pursuant to subpoena or at the request of the state of Iowa for purposes of providing testimony on the part of the state of Iowa in a hearing or other official proceeding and shall include mileage reimbursement at the rate specified in Iowa Code section 70A.9 or, if commercial air or ground transportation is used, the actual cost of transportation to and from the proceeding. Also included are actual costs incurred for meals and necessary lodging.

“Medical examination fees” means actual costs incurred by the board in a physical, mental, chemical abuse, or other impairment-related examination or evaluation of a licensee when the examination or evaluation is conducted pursuant to an order of the board.

“Transcript” means a printed verbatim reproduction of everything said on the record during a hearing or other official proceeding.

“Witness fees” means compensation paid by the board to persons appearing pursuant to subpoena or at the request of the state of Iowa for purposes of providing testimony on the part of the state of Iowa. For the purpose of this rule, com-

penensation shall be the same as outlined in Iowa Code section 622.69 or 622.72 as the case may be.

**12.43(2) Disciplinary hearing fee.** The board may charge a fee not to exceed \$75 for conducting a disciplinary hearing which results in disciplinary action taken against the licensee by the board. An order assessing a fee shall be included as part of the board's final decision. The order shall direct the licensee to deliver payment directly to the department of public health as provided in subrule 12.43(6).

**12.43(3) Recovery of related hearing costs.** The board may also recover from the licensee the costs for transcripts, witness fees and expenses, depositions, and medical examination fees. The board may assess these costs in the manner it deems most equitable in accordance with the following:

a. **Transcript costs.** The board may assess the transcript costs against the licensee pursuant to Iowa Code section 272C.6(6) or against the requesting party pursuant to Iowa Code section 17A.12(7).

(1) The cost of the transcript includes the transcript of the original contested case hearing before the board, as well as transcripts of any other formal proceedings before the board which occur after the notice of the contested case hearing is filed.

(2) In the event of an appeal to the full board from a proposed decision, the appealing party shall timely request and pay for the transcript necessary for use in the agency appeal process.

b. **Witness fees and expenses.** The parties in a contested case shall be responsible for any witness fees and expenses incurred by witnesses appearing at the contested case hearing. In addition, the board may assess a licensee the witness fees and expenses incurred by witnesses called to testify on behalf of the state of Iowa, providing the costs are calculated as follows:

(1) The costs for lay witnesses shall be determined in accordance with Iowa Code section 622.69. For purposes of calculating the mileage expenses allowed under that section, the provisions of Iowa Code section 625.2 do not apply.

(2) The costs for expert witnesses shall be determined in accordance with Iowa Code section 622.72. For purposes of calculating the mileage expenses allowed under that section, the provisions of Iowa Code section 625.2 do not apply.

(3) The provisions of Iowa Code section 622.74 regarding advance payment of witness fees and the consequences of failure to make such payment are applicable with regard to witnesses who are subpoenaed by either party to testify at the hearing.

(4) The board may assess as costs the meal and lodging expenses necessarily incurred by witnesses testifying at the request of the state of Iowa. Meal and lodging costs shall not exceed the reimbursement employees of the state of Iowa receive for these expenses under the department of revenue and finance guidelines in effect on July 1, 1993.

c. **Deposition costs.** Deposition costs for purposes of allocating costs against a licensee include only those deposition costs incurred by the state of Iowa. The licensee is directly responsible for the payment of deposition costs incurred by the licensee.

(1) The costs for depositions include the cost of transcripts, the daily charge of the court reporter for attending and transcribing the deposition, and all mileage and travel time charges of the court reporter for traveling to and from the deposition which are charged in the ordinary course of business.

## MEDICAL EXAMINERS BOARD[653](cont'd)

(2) If the deposition is of an expert witness, the deposition cost includes a reasonable expert witness fee. This fee shall not exceed the expert's customary hourly or daily fee, and shall include the time reasonably and necessarily spent in connection with such depositions, including the time spent in travel to and from the deposition, but excluding time spent in preparation for that deposition.

d. Medical examination fees. All costs of physical or mental examinations ordered by the board pursuant to Iowa Code section 272C.9(1) as part of an investigation of a pending complaint or as a sanction following a contested case shall be paid directly by the licensee.

**12.43(4)** Certification of reimbursable costs. Within ten days after conclusion of a contested case hearing and before issuance of any final decision assessing costs, the executive director/designated staff person shall certify any reimbursable costs to the board. The executive director shall calculate the specific costs, certify the cost calculated, and file the certification as part of the record in the contested case. A copy of the certification shall be served on each party of record at the time of the filing.

**12.43(5)** Assessment of fees and costs. A final decision of the board imposing disciplinary action against a licensee shall include the amount of any fee assessed, which shall not exceed \$75. If the board also assesses costs against the licensee, the final decision shall include a statement of costs delineating each category of costs and the amount assessed. The board shall specify the time period in which the fees and costs must be paid by the licensee.

a. A party shall file an objection to any fees or costs imposed in a final decision in order to exhaust administrative remedies. An objection shall be filed in the form of an application for rehearing pursuant to Iowa Code section 17A.16(2).

b. The application shall be resolved by the board consistent with the procedures for ruling on an application for rehearing. Any dispute regarding the calculations of any fees or costs to be assessed may be resolved by the board upon receipt of the parties' written objections.

**12.43(6)** Payment of fees and costs. All fees and costs assessed pursuant to this subrule shall be made in the form of a check or money order made payable to the state of Iowa and delivered by the licensee to the department of public health.

**12.43(7)** Failure to make payment. Failure of a licensee to pay any fees and costs within the time specified in the board's decision shall constitute a violation of an order of the board and shall be grounds for disciplinary action.

These rules are intended to implement Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202, and chapters 147, 148 and 272C.

ITEM 4. Adopt the following new chapter:

## CHAPTER 16

## STUDENT LOAN DEFAULT OR NONCOMPLIANCE

**653—16.1(261) Definitions.** For the purpose of this chapter the following definitions shall apply:

"Act" means Iowa Code sections 261.121 to 261.127.

"Applicant" means an individual who is seeking the issuance of a license.

"Board" means the board of medical examiners.

"Certificate" means a document known as a certificate of noncompliance from the college student aid commission certifying that the named licensee is not in compliance with the terms of an agreement for payment of a student loan obligation.

"Commission" means the college student aid commission.

"Denial notice" means a board notification denying an application for the issuance or renewal of a license as required by the Act.

"License" means a license to practice medicine and surgery, osteopathic medicine and surgery, osteopathy, or acupuncture under Iowa Code chapters 148, 148E, 150, and 150A.

"Licensee" means an individual to whom a license has been issued.

"Revocation or suspension notice" means a board notification suspending a license for an indefinite or specified period of time or a notification revoking a license as required by the Act.

"Withdrawal certificate" means a document known as a withdrawal of a certificate of noncompliance provided by the commission certifying that the certificate is withdrawn and that the board may proceed with issuance, reinstatement, or renewal of a license.

**653—16.2(261) Issuance or renewal of a license—denial.** The board shall deny the issuance or renewal of a license upon receipt of a certificate from the commission according to the procedures set forth in Iowa Code sections 261.121 to 261.127.

**653—16.3(261) Service of denial notice.** Notice shall be served upon the licensee by restricted certified mail, return receipt requested, or by personal service in accordance with the Iowa Rules of Civil Procedure. Alternatively, the licensee may accept service personally or through authorized counsel.

**16.3(1)** Effective date of denial. The effective date of the denial of issuance or renewal of a license, as specified in the notice, shall be 60 days following service of the notice upon the licensee.

**16.3(2)** Preparation and service of denial notice. The executive director of the board is authorized to prepare and serve the notice upon the licensee.

**16.3(3)** Responsibility to inform board. Applicants and licensees shall keep the board informed of all court actions and all commission actions taken under or in connection with the Act and shall provide the board copies, within seven days of filing or issuance, of all applications filed with the district court pursuant to Iowa Code section 261.127, all court orders entered in such actions, and any withdrawal certificates issued by the commission.

**16.3(4)** Reinstatement following license denial. All board fees required for application, license renewal, or license reinstatement shall be paid by applicants or licensees, and all continuing education requirements shall be met, before a license will be issued, renewed, or reinstated after the board has denied the issuance or renewal of a license pursuant to the Act.

**16.3(5)** Effect of filing in district court. In the event an applicant or licensee timely files a district court action following service of a board notice pursuant to Iowa Code sections 261.126 and 261.127, the board shall continue with the intended action described in the notice upon the receipt of a court order lifting the stay, dismissing the action, or otherwise directing the board to proceed. For purposes of determining the effective date of the denial of the issuance or renewal of a license, the board shall count the number of days before the action was filed and the number of days after the action was disposed by the court.

**16.3(6)** Final notification. The board shall notify the applicant or licensee in writing through regular first-class mail,

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or such other means as the board deems appropriate in the circumstances, within ten days of the effective date of the denial of the issuance or renewal of a license and shall similarly provide notification to the applicant or licensee when the license is issued or renewed following the board's receipt of a withdrawal certificate.

**653—16.4(261) Suspension or revocation of a license.** The board shall suspend or revoke a license upon receipt of a certificate from the commission according to the procedures set forth in the Act. This rule shall apply in addition to the procedures set forth in the Act.

**16.4(1) Service of revocation or suspension notice.** Notice shall be served upon the licensee by restricted certified mail, return receipt requested, or by personal service in accordance with the Iowa Rules of Civil Procedure. Alternatively, the licensee may accept service personally or through authorized counsel.

**16.4(2) Effective date of revocation or suspension.** The effective date of the revocation or suspension of a license, as specified in the notice, shall be 60 days following service of the notice upon the licensee.

**16.4(3) Preparation and service of revocation or suspension notice.** The executive director of the board is authorized to prepare and serve the notice upon the licensee and is directed to notify the licensee that the license will be suspended unless the license is already suspended on other grounds. In the event that the license is on suspension, the executive director shall notify the licensee of the board's intention to revoke the license.

**16.4(4) Licensee/applicant responsible to inform board.** Licensees shall keep the board informed of all court actions and all commission actions taken under or in connection with the Act and shall provide the board copies, within seven days of filing or issuance, of all applications filed with the district court pursuant to Iowa Code section 261.127, all court orders entered in such actions, and any withdrawal certificates issued by the commission.

**16.4(5) Reinstatement following license suspension or revocation.** All board fees required for license renewal or license reinstatement shall be paid by licensees, and all continuing education requirements shall be met, before a license will be renewed or reinstated after the board has suspended a license pursuant to the Act and then in accordance with rule 12.40(17A).

**16.4(6) Effect of filing in district court.** In the event a licensee timely files a district court action following service of a board notice pursuant to Iowa Code sections 261.126 and 261.127, the board shall continue with the intended action described in the notice upon the receipt of a court order lifting the stay, dismissing the action, or otherwise directing the board to proceed. For purposes of determining the effective date of the suspension or revocation of a license, the board shall count the number of days before the action was filed and the number of days after the action was disposed by the court.

**16.4(7) Final notification.** The board shall notify the licensee in writing through regular first-class mail, or such other means as the board deems appropriate in the circumstances, within ten days of the effective date of the suspension or revocation of a license and shall similarly notify the licensee when the license is reinstated following the board's receipt of a withdrawal certificate.

**653—16.5(261) Share information.** Notwithstanding any statutory confidentiality provision, the board may share in-

formation with the commission through manual or automated means for the sole purpose of identifying applicants or licensees subject to enforcement under the Act.

These rules are intended to implement Iowa Code sections 261.121 to 261.127.

## ARC 8803A

## NURSING BOARD[655]

## Notice of Intended Action

Twenty-five interested persons, a governmental subdivision, an agency or association of 25 or more persons may demand an oral presentation hereon as provided in Iowa Code section 17A.4(1)"b."

Notice is also given to the public that the Administrative Rules Review Committee may, on its own motion or on written request by any individual or group, review this proposed action under section 17A.8(6) at a regular or special meeting where the public or interested persons may be heard.

Pursuant to the authority of Iowa Code sections 17A.3, 147.76 and 272C.3, the Board of Nursing hereby gives Notice of Intended Action to amend Chapter 3, "Licensure to Practice Registered Nurse/Licensed Practical Nurse," Iowa Administrative Code.

This amendment brings Iowa requirements for foreign educated nurses into conformity with the new English proficiency requirements set forth by the Commission on Graduates of Foreign Nursing Schools.

Any interested person may make written comments or suggestions on or before April 13, 1999. Such written materials should be directed to the Executive Director, Board of Nursing, State Capitol Complex, 1223 East Court Avenue, Des Moines, Iowa 50319. Persons who want to convey their views orally should contact the Executive Director at (515)281-3256, or in the Board office at 1223 East Court Avenue, by appointment.

This amendment is intended to implement Iowa Code chapters 17A, 147, 152 and 272C.

The following amendment is proposed.

Rescind subrule 3.4(6) in its entirety and insert in lieu thereof the following **new** subrule 3.4(6):

**3.4(6) Application—individuals educated in another country.** Application for examination as a registered nurse/licensed practical nurse in Iowa shall be made according to the following process:

a. The board is responsible for the following:

(1) Provision of a "Request to Apply for Iowa Licensure by Examination for Individuals Educated in Another Country" and filing instructions to applicants.

(2) Evaluation of credentials to determine that the applicant has met all qualifications for licensure by examination.

(3) Confirmation or denial of eligibility of each applicant for licensure upon receipt of the following:

1. Application for licensure by examination.

2. Original license fee.

3. Confirmation of NCLEX registration by the national testing center.

4. Official nursing transcript denoting date of entry and date of graduation submitted by the applicant if the language of the original transcript is English or validated by the Commission on Graduates of Foreign Nursing Schools (CGFNS). If it determines a waiver is warranted because of circumstances beyond the applicant's control, the board shall issue a waiver and designate conditions which must be met.

## NURSING BOARD[655](cont'd)

5. Validation of licensure/registration in the native country submitted by CGFNS.

6. Official verification of certificate status for individuals applying for registered nurse licensure submitted by CGFNS.

7. A Nursing and Science Course Report for individuals applying for practical nurse licensure submitted by CGFNS.

8. Verification of ability to read, write, speak and understand the English language as determined by the results of the Test of English as a Foreign Language (TOEFL) for individuals applying for practical nurse licensure. The TOEFL passing standard shall be determined by the board. Applicants will be exempt from the TOEFL examination when all the following criteria are met: native language is English, nursing education was in a college, university or professional school located in Australia, Canada (except Quebec), Ireland, New Zealand or the United Kingdom; language of instruction in the nursing program was English; and language of the textbooks in the nursing program was English.

(4) Board of nursing approval shall be required prior to confirmation or denial of eligibility by the board office for individuals applying for practical nurse licensure.

b. The applicant educated in another country is responsible for the following:

(1) Submission of a completed licensure application form.

(2) Submission of the original license fee, made payable to the Iowa Board of Nursing. The fee, as outlined in rule 3.1(17A,147,152,272C), is not refundable.

(3) Submission to NCLEX of a completed NCLEX registration and registration fee.

(4) Submission of an official nursing transcript in accord with 3.4(6)“a”(3)“4.”

(5) Validation of licensure/registration in the native country by CGFNS.

(6) Official verification of CGFNS certificate status for individuals applying for registered nurse licensure.

(7) Submission of a “Nursing and Science Course by Course Report” issued by the CGFNS Credentials Evaluation Service (CES) for individuals applying for practical nurse licensure.

(8) Verification of ability to read, write, speak and understand the English language as determined by the TOEFL for individuals applying for practical nurse licensure. Applicants will be exempt from the TOEFL examination when all the criteria identified in 3.4(6)“a”(3)“8” are met.

(9) Informing the board of the applicant’s current mailing address.

(10) Self-scheduling the NCLEX examination at an approved testing center. Applicants who do not test within 95 days of NCLEX authorization shall be required to submit a new application for licensure and license fee.

(11) Completion of NCLEX registration within 12 months of receipt of the application for licensure and license fee. The board reserves the right to destroy the documents after 12 months.

ARC 8804A

## NURSING BOARD[655]

## Notice of Intended Action

Twenty-five interested persons, a governmental subdivision, an agency or association of 25 or more persons may demand an oral presentation hereon as provided in Iowa Code section 17A.4(1)“b.”

Notice is also given to the public that the Administrative Rules Review Committee may, on its own motion or on written request by any individual or group, review this proposed action under section 17A.8(6) at a regular or special meeting where the public or interested persons may be heard.

Pursuant to the authority of Iowa Code sections 17A.3, 147.76 and 272C.3, the Board of Nursing hereby gives Notice of Intended Action to rescind Chapter 4, “Disciplinary Proceedings,” and adopt in lieu thereof a new Chapter 4, “Discipline,” Iowa Administrative Code.

The Governor’s Task Force on Uniform Rules of Agency Procedure relating to contested cases are incorporated into the agency discipline chapter. This chapter reflects changes that comply with amendments to the Iowa Administrative Procedure Act in 1998 Iowa Acts, chapter 1202, which will become effective on July 1, 1999.

Any interested person may make written comments or suggestions on or before April 13, 1999. Such written materials should be directed to the Executive Director, Board of Nursing, State Capitol Complex, 1223 East Court Avenue, Des Moines, Iowa 50319. Persons who want to convey their views orally should contact the Executive Director at (515)281-3256, or in the Board office at 1223 East Court Avenue, by appointment.

These rules are intended to implement Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202, and Iowa Code sections 147.55, 152.10, 272C.4, 272C.5, 272C.6 and 272C.9.

The following chapter is proposed.

Rescind 655—Chapter 4 and adopt the following new chapter:

CHAPTER 4  
DISCIPLINE

**655—4.1(17A,147,152,272C) Board authority.** The board of nursing may discipline a registered nurse, a licensed practical nurse or an advanced registered nurse practitioner for any grounds stated in Iowa Code chapters 147, 152 and 272C, or rules promulgated thereunder.

**655—4.2(17A,147,152,272C) Complaints and investigations.** Complaints are allegations of wrongful acts or omissions relating to the ethical or professional conduct of a licensee.

**4.2(1)** In accordance with Iowa Code section 272C.3(1)“c,” the board shall investigate or review, upon written complaint or upon its own motion pursuant to other information received by the board, alleged acts or omissions which the board reasonably believes constitute cause for licensee discipline.

**4.2(2)** The executive director or authorized designee shall investigate complaints in order to determine the probability that a violation of law or rule has occurred.

**655—4.3(17A,147,152,272C) Investigatory subpoena powers.** The board shall have the authority to issue an investigatory subpoena in accordance with the provisions of Iowa Code section 17A.13.

## NURSING BOARD[655](cont'd)

**4.3(1)** A subpoena which requires production of real evidence that is necessary to an investigation may be issued upon the authority of the executive director or a designee.

**4.3(2)** In the event obedience to a subpoena is refused, the requesting party may petition the district court for enforcement.

**655—4.4(17A,147,152,272C) Board action.** The board shall review investigative conclusions and do one of the following:

1. Close the investigative case without action.
2. Request further inquiry.
3. Appoint a peer review committee to assist with the investigation.
4. Determine the existence of sufficient probable cause and order a disciplinary hearing to be held in compliance with Iowa Code section 272C.6.

**655—4.5(17A,147,152,272C) Peer review committee.** The board may establish a peer review committee to assist with the investigative process when deemed necessary.

**4.5(1)** The committee shall determine if the conduct of the licensee conforms to minimum standards of acceptable and prevailing practice of nursing and submit a report of its findings to the board.

**4.5(2)** The board shall review the committee's findings and proceed with action available under rule 4.4(17A,147,152,272C).

**4.5(3)** The peer review committee shall observe the confidentiality requirements imposed by Iowa Code section 272C.6.

**655—4.6(17A,147,152,272C) Grounds for discipline.** The board may discipline a licensee for wrongful acts or omissions related to nursing practice, licensure or unprofessional conduct and may revoke, suspend or deny issuance or renewal of licensure upon receipt of a certificate of noncompliance pursuant to Iowa Code chapters 252J and 261.

**4.6(1)** In accordance with Iowa Code section 147.55(1), behavior which constitutes fraud in procuring a license may include, but need not be limited to, the following:

- a. Falsification of the application, credentials, or records submitted to the board for licensure as a registered nurse, licensed practical nurse, or registration as an advanced registered nurse practitioner.
- b. Fraud, misrepresentation, or deceit in taking the licensing examination or in obtaining a license as a registered nurse, licensed practical nurse, or registration as an advanced registered nurse practitioner.
- c. Impersonating any applicant in any examination for licensure as a registered nurse or licensed practical nurse.

**4.6(2)** In accordance with Iowa Code section 147.55(2), professional incompetency may include, but need not be limited to, the following:

- a. Lack of knowledge, skill, or ability to discharge professional obligations within the scope of nursing practice.
- b. Deviation by the licensee from the standards of learning, education, or skill ordinarily possessed and applied by other nurses in the state of Iowa acting in the same or similar circumstances.
- c. Willful or repeated departure from or failure to conform to the minimum standards of acceptable and prevailing practice of nursing in the state of Iowa.
- d. Willful or repeated failure to practice nursing with reasonable skill and safety.
- e. Willful or repeated failure to practice within the scope of current licensure or level of preparation.

f. Failure to meet the standards as defined in 655—Chapter 6, Iowa Administrative Code.

g. Failure to comply with the requirements of Iowa Code chapter 139C.

**4.6(3)** In accordance with Iowa Code section 147.55(3), behavior (i.e., acts, knowledge, and practices) which constitutes knowingly making misleading, deceptive, untrue, or fraudulent representations in the practice of a profession may include, but need not be limited to, the following:

- a. Oral or written misrepresentation relating to degrees, credentials, licensure status, records and applications.
- b. Falsifying records related to nursing practice or knowingly permitting the use of falsified information in those records.

**4.6(4)** In accordance with Iowa Code section 147.55(3), behavior (i.e., acts, knowledge, and practices) which constitutes unethical conduct may include, but need not be limited to, the following:

- a. Performing nursing services beyond the authorized scope of practice for which the individual is licensed or prepared.
- b. Allowing another person to use one's nursing license for any purpose.
- c. Improper delegation of nursing services, functions, or responsibilities.
- d. Committing an act or omission which may adversely affect the physical or psychosocial welfare of the patient or client.
- e. Committing an act which causes physical, emotional, or financial injury to the patient or client.
- f. Engaging in sexual conduct, including inappropriate physical contact or any behavior that is seductive, demeaning, or exploitative, with regard to a patient or client.
- g. Failing to report to, or leaving, a nursing assignment without properly notifying appropriate supervisory personnel and ensuring the safety and welfare of the patient or client.
- h. Violating the confidentiality or privacy rights of the patient or client.
- i. Discriminating against a patient or client because of age, sex, race, creed, illness, economic or social status.
- j. Failing to assess, accurately document, or report the status of a patient or client.
- k. Misappropriating medications, property, supplies, or equipment of the patient, client, or agency.
- l. Fraudulently or inappropriately using or permitting the use of prescription blanks or obtaining prescription medications under false pretenses.
- m. Practicing nursing while under the influence of alcohol, illicit drugs, or while impaired by the use of legitimately prescribed pharmacological agents or medications.
- n. Being involved in the unauthorized manufacture, possession, distribution, or use of a controlled substance.
- o. Conviction of a misdemeanor or felony related to the practice of nursing.
- p. Failing to report suspected wrongful acts or omissions committed by a licensee of this board.

**655—4.7(17A,147,152,272C) Sanctions.** A sanction is a disciplinary action by the board which resolves a contested case. The board may impose one or more of the following:

1. Revocation.
2. Suspension.
3. Probation.
4. Civil penalty. A fine may be imposed in accordance with Iowa Code section 272C.3(2)"e." Assessment of a fine

## NURSING BOARD[655](cont'd)

shall be specified in the order and may not exceed a maximum amount of \$1000. Fines may be incurred for:

- Practicing without an active license: \$50 for each calendar month or part thereof, beginning on the date that a license enters delinquent status.
  - Obtaining a license by falsification of continuing education records: \$50 for each contact hour falsified.
  - Violating rule 4.6(17A,147,152,272C): an amount deemed appropriate.
5. Citation and warning.

**655—4.8(17A,147,152,272C) Panel of specialists.** The board may appoint a panel of nurses who are specialists to ascertain the facts of a case pursuant to Iowa Code section 272C.6(2). The board chairperson or designee shall appoint the presiding officer.

**4.8(1)** The executive director shall set the date, time, and location of the hearing and make proper notification to all parties.

**4.8(2)** The panel of specialists shall:

- a. Enter into the record the names of the presiding officer, members of the panel, the parties and their representatives.
- b. Enter into the record the notice and evidence of service, order for hearing, statement of charges, answer, if available, and any other pleadings, motions or orders.
- c. Receive opening statements from the parties.
- d. Receive evidence, in accordance with Iowa Code section 17A.14, on behalf of the state of Iowa and on behalf of the licensee.
- e. Question the witnesses.
- f. Receive closing statements from the parties.
- g. Determine the findings of fact by a majority vote and make a written report of its findings to the board within a reasonable period.

**655—4.9(17A,147,152,272C) Informal settlement.** Pursuant to the provisions of Iowa Code sections 17A.12 and 272C.3, the board may consider resolution of disciplinary matters through informal settlement prior to commencement of contested case proceedings. The executive director or a designee may negotiate with the licensee regarding a proposed disposition of the controversy. Upon consent of both parties, the board will review the proposal for action.

**655—4.10(17A,147,152,272C) Voluntary surrender.** A voluntary surrender of licensure may be submitted to the board as resolution of a contested case or in lieu of continued compliance with a disciplinary decision of the board.

**655—4.11(17A,147,152,272C) Application for reinstatement.** Any person whose license to practice nursing has been suspended, revoked, or voluntarily surrendered may apply to the board for reinstatement in accordance with the terms and conditions of the order.

**4.11(1)** If the license was voluntarily surrendered, or if the order for suspension or revocation did not establish terms and conditions for reinstatement, an initial application may not be made until one year has elapsed from the date of the order.

**4.11(2)** The application shall allege facts and circumstances which will enable the board to determine that the basis for the sanction or voluntary surrender no longer exists, and that it is in the public interest to reinstate the license. The burden of proof to establish these facts shall rest with the petitioner.

**4.11(3)** The hearing in an application for reinstatement is a contested case in the meaning of Iowa Code section 17A.12.

**4.11(4)** The order to grant or deny reinstatement shall incorporate findings of fact and conclusions of law. If reinstatement is granted, terms and conditions of licensure may be imposed.

**655—4.12(17A,147,152,272C) Licensee review committee.** In accordance with the provisions of Iowa Code section 272C.3(1)“k,” the board shall appoint a licensee review committee for the purpose of evaluating and monitoring licensees who self-report physical or mental impairments. The committee shall be comprised of the executive director or designee, a representative with chemical dependency or mental health treatment experience, and a recovering nurse with at least five consecutive years of sobriety.

**4.12(1)** Eligibility for referral to the committee shall be determined by the executive director in accordance with the following criteria:

- a. The licensee must self-report the impairment.
- b. The licensee must submit an evaluation summary, diagnosis, or other evidence which supports a determination that an impairment exists.
- c. There must be no indication of practice-related problems.
- d. There must be no documented violation of law or board rules related to impairment-associated behaviors.
- e. There must be no record of prior board sanction for impairment-related problems.

**4.12(2)** The committee shall meet as necessary in order to interview potential participants, develop consensual agreements for new referrals, review licensee compliance, and determine eligibility for continued monitoring.

**4.12(3)** Conditions placed upon the licensee and the duration of the monitoring period shall be established by the committee and communicated to the licensed individual in writing.

**4.12(4)** The licensee must consent to the conditions proposed by the review committee in order to participate in this program.

**4.12(5)** Failure to comply with the provisions of the agreement shall require the committee to make immediate referral of the matter to the board for possible disciplinary action.

**4.12(6)** Information in possession of the licensee review committee shall be subject to the confidentiality requirements of Iowa Code section 272C.6.

**655—4.13(17A,147,152,272C) Contested case proceedings.** The following rules apply to board activities which are initiated upon determination of probable cause and result in the issuance of a notice of hearing.

**655—4.14(17A) Definitions.** Except where otherwise specifically defined by law:

“Contested case” means a proceeding defined by Iowa Code section 17A.2(5) and includes any matter defined as a no factual dispute contested case under 1998 Iowa Acts, chapter 1202, section 14.

“Issuance” means the date of mailing of a decision or order or date of delivery if service is by other means, unless another date is specified in the order.

“Party” means each person or agency named or admitted as a party or properly seeking and entitled as of right to be admitted as a party.

“Presiding officer” means the chairperson of the board or designee.

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"Proposed decision" means the presiding officer's recommended findings of fact, conclusions of law, decision, and order in a contested case in which the Board of nursing did not preside.

**655—4.15(17A) Time requirements.**

**4.15(1)** Time shall be computed as provided in Iowa Code subsection 4.1(34).

**4.15(2)** For good cause, the presiding officer may extend or shorten the time to take any action, except as precluded by statute. Except for good cause stated in the record, before extending or shortening the time to take any action, the presiding officer shall afford all parties an opportunity to be heard or to file written arguments.

**655—4.16(17A) Notice of hearing.** The board shall issue an order, notice of hearing, and statement of charges following its determination of probable cause pursuant to Iowa Code section 17A.12(2). Delivery of the notice of hearing constitutes the commencement of the contested case proceeding.

**4.16(1)** The date, time, and location of the hearing shall be set by the chairperson or the executive director. The licensee shall be notified at least 30 days prior to the scheduled hearing.

**4.16(2)** Notification shall be in writing delivered either by personal service as in civil actions or by certified mail with return receipt requested. When the licensee cannot be located:

a. An affidavit shall be prepared outlining the measures taken to attempt service and shall become a part of the file when a notice cannot be delivered by personal service or certified mail return receipt requested.

b. Notice of hearing shall be published once each week for three consecutive weeks in a newspaper of general circulation, published or circulated in the county of last-known residence of the licensee. The newspaper will be selected by the executive director or a designee. The first notice of hearing shall be published at least 30 days prior to the scheduled hearing.

**655—4.17(17A) Presiding officer.** Disciplinary hearings shall be conducted by the board pursuant to Iowa Code section 272C.6.

**4.17(1)** The chairperson of the board shall designate the presiding officer in accordance with the provisions of section 17A.11. For nondisciplinary proceedings, any party who wishes to request that the presiding officer assigned to render a proposed decision be an administrative law judge employed by the department of inspections and appeals must file a written request within 20 days after service of a notice of hearing.

**4.17(2)** The executive director may deny the request upon a finding that one or more of the following apply:

a. Neither the agency nor any officer of the agency under whose authority the contested case is to take place is a named party to the proceeding or a real party in interest to that proceeding.

b. There is a compelling need to expedite issuance of a final decision in order to protect the public health, safety, or welfare.

c. The case involves significant policy issues of first impression that are inextricably intertwined with the factual issues presented.

d. The demeanor of the witness is likely to be dispositive in resolving the disputed factual issues.

e. Funds are unavailable to pay the costs of an administrative law judge and an interagency appeal.

f. The request was not timely filed.

g. The request is not consistent with a specified statute.  
h. The request would not conform to the disciplinary hearing provision of Iowa Code section 272C.6.

**4.17(3)** The agency (or its designee) shall issue a written ruling specifying the grounds for its decision within 20 days after a request for an administrative law judge is filed.

**4.17(4)** All rulings by an administrative law judge are subject to appeal to the agency. A party must seek any available intra-agency appeal in order to exhaust adequate administrative remedies.

**4.17(5)** Unless otherwise provided by law, agency heads and members of multimembered agency heads, when reviewing a proposed decision upon intra-agency appeal, shall have the powers of and shall comply with the provisions of this chapter which apply to presiding officers.

**655—4.18(17A) Waiver of procedures.** Unless otherwise precluded by law, the parties in a contested case proceeding may waive any provision of this chapter. However, the agency in its discretion may refuse to give effect to such a waiver when it deems the waiver to be inconsistent with the public interest.

**655—4.19(17A) Telephone proceedings.** The presiding officer may resolve preliminary procedural motions by telephone conference in which all parties have an opportunity to participate. Other telephone proceedings may be held with the consent of all parties. The presiding officer will determine the location of the parties and witnesses for telephone hearings. The convenience of the witnesses or parties, as well as the nature of the case, will be considered when location is chosen.

**655—4.20(17A) Disqualification.**

**4.20(1)** A presiding officer or other person shall withdraw from participation in the making of any proposed or final decision in a contested case if that person:

a. Has a personal bias or prejudice concerning a party or a representative of a party;

b. Has personally investigated, prosecuted or advocated in connection with that case, the specific controversy underlying that case, another pending factually related contested case, or a pending factually related controversy that may culminate in a contested case involving the same parties;

c. Is subject to the authority, direction or discretion of any person who has personally investigated, prosecuted or advocated in connection with that contested case, the specific controversy underlying that contested case, or a pending factually related contested case or controversy involving the same parties;

d. Has acted as counsel to any person who is a private party to that proceeding within the past two years;

e. Has a personal financial interest in the outcome of the case or any other significant personal interest that could be substantially affected by the outcome of the case;

f. Has a spouse or relative within the third degree of relationship that: (1) is a party to the case, or an officer, director or trustee of a party; (2) is a lawyer in the case; (3) is known to have an interest that could be substantially affected by the outcome of the case; or (4) is likely to be a material witness in the case; or

g. Has any other legally sufficient cause to withdraw from participation in the decision making in that case.

**4.20(2)** The term "personally investigated" means taking affirmative steps to interview witnesses directly or to obtain documents or other information directly. The term "personally investigated" does not include general direction and supervision of assigned investigators, unsolicited receipt of in-

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formation which is relayed to assigned investigators, review of another person's investigative work product in the course of determining whether there is probable cause to initiate a proceeding or exposure to factual information while performing other agency functions, including fact gathering for purposes other than investigation or the matter which culminates in a contested case. Factual information relevant to the merits of a contested case received by a person who later serves as presiding officer in that case shall be disclosed if required by Iowa Code section 17A.17 as amended by 1998 Iowa Acts, chapter 1202, section 19, and subrules 4.20(3) and 4.32(9).

**4.20(3)** In a situation where a presiding officer or other person knows of information which might reasonably be deemed to be a basis for disqualification and decides voluntary withdrawal is unnecessary, that person shall submit the relevant information for the record by affidavit and shall provide for the record a statement of the reasons for the determination that withdrawal is unnecessary.

**4.20(4)** If a party asserts disqualification on any appropriate ground, including those listed in subrule 4.20(1), the party shall file a motion supported by an affidavit pursuant to Iowa Code section 17A.17 as amended by 1998 Iowa Acts, chapter 1202, section 19. The motion must be filed as soon as practicable after the reason alleged in the motion becomes known to the party. If, during the course of the hearing, a party first becomes aware of evidence of bias or other grounds for disqualification, the party may move for disqualification but must establish the grounds by the introduction of evidence into the record.

If the presiding officer determines that disqualification is appropriate, the presiding officer or other person shall withdraw. If the presiding officer determines that withdrawal is not required, the presiding officer shall enter an order to that effect. A party asserting disqualification may seek an interlocutory appeal under rule 4.34(17A).

**655—4.21(17A) Consolidation—severance.**

**4.21(1)** Consolidation. The presiding officer may consolidate any or all matters at issue in two or more contested case proceedings where: (a) the matters at issue involve common parties or common questions of fact or law; (b) consolidation would expedite and simplify consideration of the issues involved; and (c) consolidation would not adversely affect the rights of any of the parties to those proceedings.

**4.21(2)** Severance. The presiding officer may, for good cause shown, order any contested case proceedings or portions thereof severed.

**655—4.22(17A) Pleadings.**

**4.22(1)** Pleadings may be required by rule, by notice of hearing, or by order of the presiding officer.

**4.22(2) Petition.**

a. Any petition required in a contested case proceeding shall be filed within 20 days of delivery of the notice of hearing or subsequent order of the presiding officer, unless otherwise ordered.

b. A petition shall state in separately numbered paragraphs the following:

- (1) The persons or entities on whose behalf the petition is filed;
- (2) The particular provisions of statutes and rules involved;
- (3) The relief demanded and the facts and laws relied upon for such relief; and
- (4) The name, address and telephone number of the petitioner and the petitioner's attorney.

**4.22(3)** Answer. An answer may be filed within 20 days of service of the petition. A party may move to dismiss or apply for a more definite and detailed statement when appropriate.

An answer shall show on whose behalf it is filed and specifically admit, deny, or otherwise answer all material allegations of the pleading to which it responds. It shall state any facts deemed to show an affirmative defense and contain as many additional defenses as the pleader may claim.

An answer shall state the name, address and telephone number of the person filing the answer, the person or entity on whose behalf it is filed, and the attorney representing that person.

Any allegation in the petition not denied in the answer is considered admitted. The presiding officer may refuse to consider any defense not raised in the answer which could have been raised on the basis of facts known when the answer was filed if any party would be prejudiced.

**655—4.23(17A) Service and filing of pleadings and other papers.**

**4.23(1)** When service required. Except where otherwise provided by law, every pleading, motion, document, or other paper filed in a contested case proceeding and every paper relating to discovery in such a proceeding shall be served upon each of the parties of record to the proceeding, including the person designated as advocate or prosecutor for the state or the agency. Except for the original notice of hearing and an application for rehearing as provided in Iowa Code section 17A.16(2), the party filing a document is responsible for service on all parties.

**4.23(2)** Service—how made. Service upon a party represented by an attorney shall be made upon the attorney unless otherwise ordered. Service is made by delivery or by mailing a copy to the person's last-known address. Service by mail is complete upon mailing, except where otherwise specifically provided by statute, rule, or order.

**4.23(3)** Filing—when required. After the notice of hearing, all pleadings, motions, documents or other papers in a contested case proceeding shall be filed with the board.

**4.23(4)** Filing—when made. Except where otherwise provided by law, a document is deemed filed at the time it is delivered to the board office, delivered to an established courier service for immediate delivery to that office, or mailed by first-class mail or state interoffice mail to that office, so long as there is proof of mailing.

**4.23(5)** Proof of mailing. Proof of mailing includes either: a legible United States Postal Service postmark on the envelope, a certificate of service, a notarized affidavit, or a certification in substantially the following form:

I certify under penalty of perjury and pursuant to the laws of Iowa that, on (date of mailing), I mailed copies of (describe document) addressed to the (agency office and address) and to the names and addresses of the parties listed below by depositing the same in the United States mail or state interoffice mail.

(Date) (Signature)

**655—4.24(17A) Discovery.**

**4.24(1)** Discovery procedures applicable in civil actions are applicable in contested cases. Unless lengthened or shortened by these rules or by order of the presiding officer, time periods for compliance with discovery shall be as provided in the Iowa Rules of Civil Procedure.

**4.24(2)** Any motion relating to discovery shall allege that the moving party has previously made a good-faith attempt to resolve the discovery issues involved with the opposing party. Motions in regard to discovery shall be ruled upon by

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the presiding officer. Opposing parties shall be afforded the opportunity to respond within ten days of the filing of the motion unless the time is shortened as provided in subrule 4.24(1). The presiding officer may rule on the basis of the written motion and any response, or may order argument on the motion.

**4.24(3)** Evidence obtained in discovery may be used in the contested case proceeding if that evidence would otherwise be admissible in that proceeding.

**655—4.25(17A) Subpoenas.****4.25(1) Issuance.**

a. An agency subpoena shall be issued to a party on request. Such a request must be in writing. In the absence of good cause for permitting later action, a request for a subpoena must be received at least three days before the scheduled hearing. The request shall include the name, address, and telephone number of the requesting party.

b. Except to the extent otherwise provided by law, parties are responsible for service of their own subpoenas and payment of witness fees and mileage expenses.

**4.25(2)** Motion to quash or modify. The presiding officer may quash or modify a subpoena for any lawful reason upon motion in accordance with the Iowa Rules of Civil Procedure. A motion to quash or modify a subpoena shall be set for argument promptly.

**655—4.26(17A) Motions.**

**4.26(1)** No technical form for motions is required. However, prehearing motions must be in writing, state the grounds for relief, and state the relief sought.

**4.26(2)** Any party may file a written response to a motion within ten days after the motion is served, unless the time period is extended or shortened by rules of the agency or the presiding officer. The presiding officer may consider a failure to respond within the required time period in ruling on a motion.

**4.26(3)** The presiding officer may schedule oral argument on any motion.

**4.26(4)** Motions pertaining to the hearing must be filed and served at least ten days prior to the date of hearing unless there is good cause for permitting later action or the time for such action is lengthened or shortened by rule of the agency or an order of the presiding officer.

**655—4.27(17A) Prehearing conference.**

**4.27(1)** Any party may request a prehearing conference. A written request for prehearing conference or an order for prehearing conference on the presiding officer's own motion shall be filed not less than seven days prior to the hearing date. A prehearing conference shall be scheduled not less than three business days prior to the hearing date.

Written notice of the prehearing conference shall be given by the board office to all parties. For good cause the presiding officer may permit variances from this rule.

**4.27(2)** Each party shall bring to the prehearing conference:

a. A final list of witnesses the party anticipates will testify at hearing. Witnesses not listed may be excluded from testifying unless there was good cause for the failure to include their names; and

b. A final list of exhibits which the party anticipates will be introduced at hearing. Exhibits other than rebuttal exhibits that are not listed may be excluded from admission into evidence unless there was good cause for the failure to include them.

c. Witness or exhibit lists may be amended subsequent to the prehearing conference within the time limits estab-

lished by the presiding officer at the prehearing conference. Any such amendments must be served on all parties.

**4.27(3)** In addition to the requirements of subrule 4.27(2), the parties at a prehearing conference may:

a. Enter into stipulations of law or fact;

b. Enter into stipulations on the admissibility of exhibits;

c. Identify matters which the parties intend to request be officially noticed;

d. Enter into stipulations for waiver of any provision of law; and

e. Consider any additional matters which will expedite the hearing.

**4.27(4)** Prehearing conferences shall be conducted by telephone unless otherwise ordered. Parties shall exchange and receive witness and exhibit lists in advance of a telephone prehearing conference.

**655—4.28(17A) Continuances.** The executive director shall have the authority to grant a continuance after consultation, if needed, with the chairperson of the board.

A request for continuance of a contested case matter must be submitted in writing to the board not later than seven days prior to the scheduled date of the hearing. Exceptions shall be granted at the discretion of the executive director only in situations involving extenuating, extraordinary, or emergency circumstances.

**655—4.29(17A) Hearing procedures.**

**4.29(1)** The presiding officer presides at the hearing and may rule on motions, require briefs, issue a decision, and issue such orders and rulings as will ensure the orderly conduct of the proceedings.

**4.29(2)** All objections shall be timely made and stated on the record.

**4.29(3)** Parties have the right to participate or be represented in all hearings or prehearing conferences related to their case. Any party may be represented by an attorney or another person authorized by law.

**4.29(4)** Subject to terms and conditions prescribed by the presiding officer, parties have the right to introduce evidence on issues of material fact, cross-examine witnesses present at the hearing as necessary for a full and true disclosure of the facts, present evidence in rebuttal, and submit briefs and engage in oral argument.

**4.29(5)** The presiding officer shall maintain the decorum of the hearing and may refuse to admit or may expel anyone whose conduct is disorderly.

**4.29(6)** Witnesses may be sequestered during the hearing.

**4.29(7)** The presiding officer shall conduct the hearing in the following manner:

a. The presiding officer shall give an opening statement briefly describing the nature of the proceedings;

b. The parties shall be given an opportunity to present opening statements;

c. Parties shall present their cases in the sequence determined by the presiding officer;

d. Each witness shall be sworn or affirmed by the presiding officer or the court reporter, and be subject to examination and cross-examination. The presiding officer may limit questioning in a manner consistent with law;

e. When all parties and witnesses have been heard, parties may be given the opportunity to present final arguments.

**655—4.30(17A) Evidence.**

**4.30(1)** The presiding officer shall rule on admissibility of evidence and may, where appropriate, take official notice

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of facts in accordance with all applicable requirements of law.

**4.30(2)** Stipulation of facts is encouraged. The presiding officer may make a decision based on stipulated facts.

**4.30(3)** Evidence in the proceeding shall be confined to those issues to which the parties received notice prior to the hearing, unless the parties waive their right to such notice or the presiding officer determines that good cause justifies expansion of the issues. If the presiding officer decides to admit evidence on issues outside the scope of the notice over the objection of a party who did not have actual notice of those issues, that party, upon timely request, shall receive a continuance sufficient to amend pleadings and to prepare on the additional issue.

**4.30(4)** The party seeking admission of an exhibit must provide opposing parties with an opportunity to examine the exhibit prior to the ruling on its admissibility. Copies of documents should normally be provided to opposing parties.

**4.30(5)** Any party may object to specific evidence or may request limits on scope of any examination or cross-examination. Such an objection shall be accompanied by a brief statement of the grounds upon which it is based. The objection, the ruling on the objection, and the reasons for the ruling shall be noted in the record. The presiding officer may rule on the objection at the time it is made or may reserve a ruling until the written decision.

**4.30(6)** Whenever evidence is ruled inadmissible, the party offering that evidence may submit an offer of proof on the record. The party making the offer of proof for excluded oral testimony shall briefly summarize the testimony or, with permission of the presiding officer, present the testimony. If the excluded evidence consists of a document or exhibit, it shall be marked as part of an order of proof and inserted in the record.

**655—4.31(17A) Default.**

**4.31(1)** If a party fails to appear or participate in a contested case proceeding after proper service of notice, the presiding officer may, if no adjournment is granted, enter a default decision or proceed with the hearing and render a decision in the absence of the party.

**4.31(2)** Where appropriate and not contrary to law, any party may move for default against a party who has requested the contested case proceeding and has failed to file a required pleading or has failed to appear after proper service.

**4.31(3)** Default decisions or decisions rendered on the merits after a party has failed to appear or participate in a contested case proceeding become final agency action unless, within 15 days after the date of notification or mailing of the decision, a motion to vacate is filed and served on all parties or an appeal of a decision on the merits is timely initiated within the time provided by rule 4.36(17A). A motion to vacate must state all facts relied upon by the moving party which establish that good cause existed for that party's failure to appear or participate at the contested case proceeding. Each fact so stated must be substantiated by at least one sworn affidavit or a person with personal knowledge of each such fact attached to the motion.

**4.31(4)** The time for further appeal of a decision for which a timely motion to vacate has been filed is stayed pending a decision on the motion to vacate.

**4.31(5)** Properly substantiated and timely filed motions to vacate shall be granted only for good cause shown. The burden of proof as to good cause is on the moving party. Adverse parties shall have ten days to respond to a motion to vacate. Adverse parties shall be allowed to conduct discovery as to the issue of good cause and to present evidence on the

issue prior to a decision on the motion, if a request to do so is included in that party's response.

**4.31(6)** "Good cause" for purposes of this rule shall have the same meaning as "good cause" for setting aside a default judgment under Iowa Rule of Civil Procedure 236.

**4.31(7)** A decision denying a motion to vacate is subject to further appeal within the time limit allowed for further appeal of a decision on the merits in the contested case proceeding. A decision granting a motion to vacate is subject to interlocutory appeal by the adverse party pursuant to rule 4.34(17A).

**655—4.32(17A) Ex parte communication.**

**4.32(1)** Prohibited communications. Unless required for the disposition of ex parte matters specifically authorized by statute, following issuance of the notice of hearing, there shall be no communication, directly or indirectly, between the presiding officer and any party or representative of any party or any other person with a direct or indirect interest in such case in connection with any issue of fact or law in the case, except upon notice and opportunity for all parties to participate. This does not prohibit persons jointly assigned such tasks from communicating with each other. Nothing in this provision is intended to preclude the presiding officer from communicating with members of the agency or seeking the advice or help of persons other than those with a personal interest in, or those engaged in personally investigating as defined in subrule 4.20(2), prosecuting, or advocating in, either the case under consideration or a pending factually related case involving the same parties, as long as those persons do not directly or indirectly communicate to the presiding officer any ex parte communications they have received of a type that the presiding officer would be prohibited from receiving or that furnish, augment, diminish, or modify the evidence in the record.

**4.32(2)** Prohibitions on ex parte communications commence with the issuance of the notice of hearing in a contested case and continue for as long as the case is pending.

**4.32(3)** Written, oral or other forms of communication are "ex parte" if made without notice and opportunity for all parties to participate.

**4.32(4)** To avoid prohibited ex parte communications, notice must be given in a manner reasonably calculated to give all parties a fair opportunity to participate. Notice of written communications shall be provided in compliance with rule 4.23(17A) and may be supplemented by telephone, facsimile, E-mail or other means of notification. Where permitted, oral communications may be initiated through telephone conference call, which includes all parties or their representatives.

**4.32(5)** Persons who jointly act as presiding officer in a pending contested case may communicate with each other without notice or opportunity for parties to participate.

**4.32(6)** The executive director or other persons may be present in deliberations or otherwise advise the presiding officer without notice or opportunity for parties to participate as long as they are not disqualified from participating in the making of a proposed or final decision under subrule 4.20(1) or other law and they comply with subrule 4.32(1).

**4.32(7)** Communications with the presiding officer involving scheduling or uncontested procedural matters do not require notice or opportunity for parties to participate. A party should notify other parties prior to initiating such contact with the presiding officer when feasible, and shall notify other parties when seeking to continue hearings or other deadlines pursuant to rule 4.29(17A).

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**4.32(8)** Disclosure of prohibited communications. A presiding officer who received a prohibited ex parte communication during the pendency of a contested case must initially determine if the effect of the communication is so prejudicial that the presiding officer should be disqualified. If the presiding officer determines that disqualification is warranted, a copy of any prohibited written communication, all written responses to the communication, a written summary stating the substance of any prohibited oral or other communication not available in written form for disclosure, all responses made, and the identity of each person from whom the presiding officer received a prohibited ex parte communication shall be submitted for inclusion in the record under seal by protective order. If the presiding officer determines that disqualification is not warranted, such documents shall be submitted for inclusion in the record and served on all parties. Any party desiring to rebut the prohibited communication must be allowed the opportunity to do so upon written request filed within ten days after notice of the communication.

**4.32(9)** Promptly after being assigned to serve as presiding officer on a hearing panel, as a member of a full board hearing, on an intra-agency appeal, or other basis, a presiding officer shall disclose to all parties material factual information received through ex parte communication prior to such assignment, unless the factual information has already been or shortly will be disclosed pursuant to Iowa Code section 17A.13(2) or through discovery. Factual information contained in an investigative report or similar document need not be separately disclosed by the presiding officer as long as such documents have been or will shortly be provided to the parties.

**4.32(10)** The presiding officer may render a proposed or final decision imposing appropriate sanctions for violations of this rule including default, a decision against the offending party, censure, or suspension or revocation of the privilege to practice before the agency. Violation of ex parte communication prohibitions by agency personnel shall be reported to the board's executive director for possible sanctions including: censure, suspension, dismissal, or other disciplinary action.

**655—4.33(17A) Recording costs.** Upon request, the board of nursing shall provide a copy of the whole or any portion of the record at cost. The cost of preparing a copy of the record or of transcribing the hearing record shall be paid by the requesting party.

Parties who request that a hearing be recorded by certified shorthand reporters rather than by electronic means shall bear the cost of such recording, unless otherwise provided by law.

**655—4.34(17A) Final decision.** When the board presides over reception of the evidence at the hearing, its decision is a final decision.

**4.34(1)** When a panel of specialists presides over the reception of evidence at the hearing, the findings of fact shall be considered by the board at the earliest practicable time. The decision of the board is a final decision.

**4.34(2)** A final decision in a contested case proceeding shall be in writing and include findings of fact and conclusions of law, separately stated.

a. Findings of fact shall be accompanied by a concise and explicit statement of underlying facts supporting the findings.

b. The decision shall include an explanation of why the relevant evidence in the record supports each material finding of fact.

c. Conclusions of law shall be supported by cited authority or by a reasoned opinion.

**4.34(3)** The decision or order shall be promptly delivered to the parties in the manner provided by section 17A.12 as amended by 1998 Iowa Acts, chapter 1202.

**4.34(4)** The final decision is a public record pursuant to Iowa Code section 272C.6(4).

**655—4.35(17A) Appeals.**

**4.35(1)** Appeal by party. Any adversely affected party may appeal a final decision of the board to the district court within 30 days after issuance, in accordance with Iowa Code section 17A.19 as amended by 1998 Iowa Acts, chapter 1202.

**4.35(2)** Review. The board may initiate review of the decision or order on its own motion at any time within 30 days following the issuance of such a decision.

**4.35(3)** Notice of appeal. An appeal of a decision or order is initiated by filing a timely notice of appeal with the board. The notice of appeal must be signed by the appealing party or a representative of that party and contain a certificate of service. The notice shall specify:

- a. The parties initiating the appeal;
- b. The proposed decision or order appealed from;
- c. The specific findings or conclusions to which exception is taken and any other exceptions to the decision or order;
- d. The relief sought;
- e. The grounds for relief.

**4.35(4)** Requests to present additional evidence. A party may request the taking of additional evidence only by establishing that the evidence is material, that good cause existed for the failure to present the evidence at the hearing, and that the party has not waived the right to present the evidence. A written request to present additional evidence must be filed with the notice of appeal or, by a nonappealing party, within 15 days of service of the notice of appeal. The board may remand a case to the presiding officer for further hearing or may itself preside at the taking of additional evidence.

**4.35(5)** Scheduling. The board of nursing shall issue a schedule for consideration of the appeal.

**4.35(6)** Briefs and arguments. Unless otherwise ordered, within 20 days of the notice of appeal or order for review, each appealing party may file exceptions and briefs. Within 20 days thereafter, any party may file a responsive brief. Briefs shall cite any applicable legal authority and specify relevant portions of the record in that proceeding. Written requests to present an oral argument shall be filed with the briefs.

The board may resolve the appeal on the briefs or provide an opportunity for oral argument. The board may shorten or extend the briefing period as appropriate.

**655—4.36(17A) Applications for rehearing.**

**4.36(1)** By whom filed. Any party to a contested case proceeding may file an application for rehearing from a final order.

**4.36(2)** Content of application. The application for rehearing shall state on whose behalf it is filed, the specific grounds for rehearing, and the relief sought. In addition, the application shall state whether the applicant desires reconsideration of all or part of the agency decision on the existing record and whether, on the basis of the grounds enumerated in subrule 4.36(4), the applicant requests an opportunity to submit additional evidence.

**4.36(3)** Time of filing. The application shall be filed with the board office within 20 days after issuance of the final decision.

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**4.36(4)** Notice to other parties. A copy of the application shall be timely mailed by the applicant to all parties of record not joining therein. If the applicant does not contain a certificate of service, the board shall serve copies on all parties.

**4.36(5)** Disposition. Any application for a rehearing shall be deemed denied unless the agency grants the application within 20 days after its filing.

**655—4.37(17A) No factual dispute contested cases.** If the parties agree that no dispute of material fact exists as to a matter that would be a contested case if such a dispute of fact existed, the parties may present all relevant admissible evidence either by stipulation or otherwise as agreed by the parties, without necessity for the production of evidence at an evidentiary hearing. If such agreement is reached, a jointly submitted schedule detailing the method and timetable for submission of the record, briefs and oral argument should be submitted to the presiding officer for approval as soon as practicable.

**655—4.38(17A) Emergency adjudicative proceedings.**

**4.38(1)** Necessary emergency action. To the extent necessary to prevent or avoid immediate danger to the public health, safety, or welfare, the agency may issue a written order in compliance with Iowa Code section 17A.18 to suspend a license in whole or in part, order the cessation of any continuing activity, order affirmative action, or take other action within the jurisdiction of the agency by emergency adjudicative order. Before issuing an emergency adjudicative order the agency shall consider factors including, but not limited to, the following:

a. Whether there has been a sufficient factual investigation to assure that the agency is proceeding on the basis of reliable information;

b. Whether the specific circumstances which pose immediate danger to the public health, safety or welfare have been identified and determined to be continuing;

c. Whether the person required to comply with the emergency adjudicative order may continue to engage in other activities without posing immediate danger to the public health, safety or welfare;

d. Whether imposition of monitoring requirements or other interim safeguards would be sufficient to protect the public health, safety or welfare; and

e. Whether the specific action contemplated by the agency is necessary to avoid the immediate danger.

**4.38(2) Issuance.**

a. The written emergency adjudicative order shall be immediately delivered to persons who are required to comply with the order by utilizing one or more of the following procedures:

(1) Personal delivery;

(2) Certified mail, return receipt requested, to the last address on file with the agency;

(3) Certified mail to the last address on file with the agency;

(4) First-class mail to the last address on file with the agency; or

(5) Fax. Fax may be used as the sole method of delivery if the person required to comply with the order has filed a written request that agency orders be sent by fax and has provided a fax number for that purpose.

b. To the degree practicable, the agency shall select the procedure for providing written notice that best insures prompt, reliable delivery.

**4.38(3)** Oral notice. Unless the written emergency adjudicative order is provided by personal delivery on the same day that the order issues, the agency shall make reasonable immediate efforts to contact by telephone the persons who are required to comply with the order.

**4.38(4)** Completion of proceedings. Issuance of a written emergency adjudicative order shall include notification of the date on which agency proceedings are scheduled for completion. After issuance of an emergency adjudicative order, continuance of further agency proceedings to a later date will be granted only in compelling circumstances upon application in writing.

These rules are intended to implement Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202, and Iowa code sections 147.55, 152.10, 272C.4, 272C.5, 272C.6, and 272C.9.

## ARC 8805A

### NURSING BOARD[655]

#### Notice of Intended Action

Twenty-five interested persons, a governmental subdivision, an agency or association of 25 or more persons may demand an oral presentation hereon as provided in Iowa Code section 17A.4(1)\*b."

Notice is also given to the public that the Administrative Rules Review Committee may, on its own motion or on written request by any individual or group, review this proposed action under section 17A.8(6) at a regular or special meeting where the public or interested persons may be heard.

Pursuant to the authority of Iowa Code section 147.76, the Board of Nursing hereby gives Notice of Intended Action to amend Chapter 5, "Continuing Education," Iowa Administrative Code.

This amendment deletes from 5.3(2)"a" the following sentence: "A nonsectarian approach shall be utilized." The amendment is nonsubstantive and corrective in nature. There are six identified areas of subject matter criteria for programs to qualify for nursing continuing education and having this qualifier is unnecessary.

Any interested person may make written comments or suggestions on or before April 13, 1999. Such written materials should be directed to the Executive Director, Board of Nursing, State Capitol Complex, 1223 East Court Avenue, Des Moines, Iowa 50319. Persons who want to convey their views orally should contact the Executive Director at (515)281-3256, or in the Board office at 1223 East Court Avenue, by appointment.

This amendment is intended to implement Iowa Code section 272C.2.

The following amendment is proposed.

Amend subrule 5.3(2), paragraph "a," introductory paragraph, to read as follows:

a. Criteria related to appropriate subject matter. Appropriate subject matter for continuing education credits reflects the educational needs of the nurse learner and the health needs of the consumer. Subject matter is limited to offerings that are scientifically founded and predominantly for professional growth. ~~A nonsectarian approach shall be utilized.~~ The following areas are deemed appropriate subject matter for continuing education credit:

## ARC 8806A

## NURSING BOARD[655]

## Notice of Intended Action

Twenty-five interested persons, a governmental subdivision, an agency or association of 25 or more persons may demand an oral presentation hereon as provided in Iowa Code section 17A.4(1)"b."

Notice is also given to the public that the Administrative Rules Review Committee may, on its own motion or on written request by any individual or group, review this proposed action under section 17A.8(6) at a regular or special meeting where the public or interested persons may be heard.

Pursuant to the authority of Iowa Code sections 17A.3, 147.76 and 272C.3, the Board of Nursing hereby gives Notice of Intended Action to rescind Chapter 8, "Petitions for Rule Making," Chapter 9, "Declaratory Rulings," and Chapter 10, "Rule Making," and to adopt Chapter 8, "Petitions for Rule Making," Chapter 9, "Declaratory Orders," Chapter 10, "Agency Procedure for Rule Making," and Chapter 14, "Fair Information Practices," Iowa Administrative Code.

The rules reflect changes necessary to comply with amendments to the Iowa Administrative Procedure Act in 1998 Iowa Acts, chapter 1202, which will become effective on July 1, 1999. Amendments are set out as changes to the Uniform Rules on Agency Procedure.

Any interested person may make written comments or suggestions on or before April 13, 1999. Such written materials should be directed to the Executive Director, Board of Nursing, State Capitol Complex, 1223 East Court Avenue, Des Moines, Iowa 50319. Persons who want to convey their views orally should contact the Executive Director at (515)281-3256, or in the Board office at 1223 East Court Avenue, by appointment.

These rules are intended to implement Iowa Code sections 17A.3, 17A.4, 17A.5, 17A.7, 17A.9, 17A.12 and 17A.15 as amended by 1998 Iowa Acts, chapter 1202.

The following amendments are proposed.

ITEM 1. Rescind **655—Chapter 8** and adopt the following **new** chapter in lieu thereof:

CHAPTER 8  
PETITIONS FOR RULE MAKING

The board of nursing hereby adopts the Uniform Rules on Agency Procedure relating to petitions for rule making which are printed in the first volume of the Iowa Administrative Code, with the following amendments:

**655—8.1(17A) Petition for rule making.** In lieu of the words "(designate office)", insert "board of nursing".

In lieu of the words "(AGENCY NAME)", insert "BOARD OF NURSING".

**655—8.3(17A) Inquiries.** In lieu of the words "(designate official by full title and address)", insert "the Executive Director, Board of Nursing, 1223 East Court Avenue, Des Moines, Iowa 50319".

ITEM 2. Rescind **655—Chapter 9** and adopt the following **new** chapter in lieu thereof:

CHAPTER 9  
DECLARATORY ORDERS

The board of nursing hereby adopts, with the following exceptions and amendments, the Uniform Rules on Agency

Procedure relating to declaratory rulings which are printed in the first volume of the Iowa Administrative Code.

**655—9.1(17A) Petition for declaratory order.** In lieu of the words "(designate agency)", insert "board of nursing".

In lieu of the words "(designate office)", insert "1223 East Court Avenue, Des Moines, Iowa 50319".

In lieu of the words "(AGENCY NAME)", insert "BOARD OF NURSING".

Delete the following: "(An agency may wish to describe here a simplified alternative petition form that would be more appropriate for some members of its clientele in light of their particular circumstances.)".

**655—9.2(17A) Notice of petition.** In lieu of the underline insert "15" and delete the words "(15 or less)".

In lieu of the words "(designate agency)", insert "board of nursing".

**655—9.3(17A) Intervention.**

**9.3(1)** In lieu of the underline, insert "15".

**9.3(2)** In lieu of the words "(designate agency)", insert "board of nursing".

**9.3(3)** In lieu of the words "(designate office)", insert "the board of nursing".

In lieu of the words "(designate agency)", insert "board of nursing".

In lieu of the words "(AGENCY NAME)", insert "BOARD OF NURSING".

Delete the words "(An agency may wish to describe here a simplified alternative petition for intervention form that would be more appropriate for some members of its clientele in light of their particular circumstances.)".

**655—9.4(17A) Briefs.** In lieu of the words "(designate agency)", insert "board of nursing".

**655—9.5(17A) Inquiries.** In lieu of the words "(designate official by full title and address)", insert "the Executive Director, Board of Nursing, 1223 East Court Avenue, Des Moines, Iowa 50319".

**655—9.6(17A) Service and filing of petitions and other papers.**

**9.6(2)** In lieu of the words "(specify office and address)", insert "the Board of Nursing, 1223 East Court Avenue, Des Moines, Iowa 50319".

In lieu of the words "(agency name)", insert "board of nursing".

**9.6(3)** In lieu of the words "(uniform rule on contested cases X.12(17A))", insert "655 IAC 4.16(17A)".

**655—9.7(17A) Consideration.** In lieu of the words "(designate agency)", insert "board of nursing".

**655—9.8(17A) Action on petition.**

**9.8(1)** In lieu of the words "(designate agency head)", insert "board of nursing".

**9.8(2)** In lieu of the words "as defined in (contested case uniform rule X.2(17A))", insert "the date of mailing of a decision or order, or date of delivery if service is by other means, unless another date is specified".

**655—9.9(17A) Refusal to issue order.**

**9.9(1)** In lieu of the words "(designate agency)", insert "board of nursing".

**2.** In lieu of the words "(designate agency)", insert "board of nursing".

**3.** In lieu of the words "(designate agency)", insert "board of nursing".

## NURSING BOARD[655](cont'd)

10. In lieu of the words "(designate agency)", insert "board of nursing".

Delete the words "(Where the agency's experience enables it to define in advance other specific reasons for refusing to issue a declaratory ruling, it should include them here.)".

**655—9.12(17A) Effect of a declaratory order.** In lieu of the words "(designate agency)", insert "board of nursing".

ITEM 3. Rescind **655—Chapter 10** and adopt the following new chapter:

**CHAPTER 10  
AGENCY PROCEDURE FOR RULE MAKING**

The board of nursing hereby adopts, with the following exceptions and amendments, the Uniform Rules on Agency Procedure relating to procedures for rule making which are printed in the first volume of the Iowa Administrative Code.

**655—10.3(17A) Public rule-making docket.**

**10.3(2)** Delete the words "(commission, council, director)".

**655—10.4(17A) Notice of proposed rule making.**

**10.4(3)** In lieu of the words "(specify time period)", insert "one year".

**655—10.5(17A) Public participation.**

**10.5(1)** In lieu of the words "(identify office and address)", insert "the Board of Nursing, 1223 East Court Avenue, Des Moines, Iowa 50319".

**10.5(5)** In lieu of the words "(designate office and telephone number)", insert "the board of nursing at (515) 281-3255".

**655—10.6(17A) Regulatory analysis.**

**10.6(2)** In lieu of the words "(designate office)", insert "the board of nursing".

**655—10.10(17A) Exemptions from public rule-making procedures.**

**10.10(2)** In lieu of the words "(List here narrowly drawn classes of rules where such an exemption is justified and a brief statement of the reasons for exempting each of them.)", insert the following:

"a. The rule confers a benefit or removes a restriction on the public or some segment thereof.

"b. The effective date is necessary because of imminent peril to the public health, safety or welfare."

**655—10.11(17A) Concise statement of reasons.**

**10.11(1)** In lieu of the words "(specify the office and address)", insert "the Board of Nursing, 1223 East Court Avenue, Des Moines, Iowa 50319".

**655—10.12(17A) Contents, style, and form of rule.**

**10.12(3)** Delete the word "actual".

**655—10.13(17A) Agency rule-making record.**

**10.13(2) Contents.**

c. In lieu of the words "(agency head)", insert "board of nursing".

**10.13(4)** Delete the words "(Alternatively, the agency can maintain the file indefinitely.)" and the words "(Note: Alternatively to X.13(2)"j" and the amendment to X.13(4), an agency could keep a separate file of significant written criticisms to rules and maintain those for five years.)".

ITEM 4. Adopt the following new chapter:

**CHAPTER 14  
FAIR INFORMATION PRACTICES**

The board of nursing hereby adopts, with the following exceptions and amendments, Uniform Rules on Agency Procedure relating to fair information practices which are printed in the first volume of the Iowa Administrative Code.

**655—14.1(17A,22) Definitions.**

"Agency." In lieu of the words "(official or body issuing these rules)", insert "board of nursing".

**655—14.3(17A,22) Requests for access to records.**

**14.3(1)** In lieu of the words "(insert agency head)", insert "executive director".

In lieu of the words "(insert agency name and address)", insert "the Board of Nursing, 1223 East Court Avenue, Des Moines, Iowa 50319".

**14.3(2) Office hours.** In lieu of the words "(insert customary office hours and, if agency does not have customary office hours of at least thirty hours per week, insert hours specified in Iowa Code section 22.4)", insert "Monday through Friday from 8 a.m. to 4:30 p.m., excluding legal holidays".

**14.3(7) Fees.**

c. In lieu of the words "(specify time period)", insert "one hour".

Delete the words "(An agency wishing to deal with search fees authorized by law should do so here.)".

**655—14.6(17A,22) Procedure by which additions, dis-  
sents, or objections may be entered into certain records.**

In lieu of the words "(designate office)", insert "the board of nursing".

**655—14.7(17A,22) Consent to disclosure by the subject  
of a confidential record.** Delete the words "(and, where applicable, the time period during which the record may be disclosed)" and "(Additional requirements may be necessary for special classes of records.)".

**655—14.8(17A,22) Notice to suppliers of information.**

Delete the words "(Each agency should revise its forms to provide this information.)".

**ARC 8853A**

**PAROLE BOARD[205]**

**Notice of Intended Action**

Twenty-five interested persons, a governmental subdivision, an agency or association of 25 or more persons may demand an oral presentation hereon as provided in Iowa Code section 17A.4(1)"b."

Notice is also given to the public that the Administrative Rules Review Committee may, on its own motion or on written request by any individual or group, review this proposed action under section 17A.8(6) at a regular or special meeting where the public or interested persons may be heard.

Pursuant to the authority of Iowa Code sections 904A.4(2) and 906.3, the Board of Parole hereby gives Notice of Intended Action to rescind Chapters 1 to 15, in their entirety, and adopt new Chapters 1 to 15, Iowa Administrative Code.

Since the Board's present rules became effective on March 29, 1989, there have been substantial changes in the Iowa Code sections which the rules are intended to implement, as well as in Board policy and procedure. These changes have necessitated a redrafting of the Board's administrative rules. A synopsis of the rules is as follows:

## PAROLE BOARD[205](cont'd)

Chapter 1 defines the organization, administration, and duties of the Board of Parole.

Chapter 2 provides the general rule-making procedures of the Board of Parole.

Chapter 3 provides the manner in which the public may petition for rule making.

Chapter 4 provides the manner in which the public may request a declaratory order.

Chapter 5 provides information regarding the Iowa Fair Information Practices Act.

Chapter 6 defines public records and communications with the Board of Parole.

Chapter 7 provides procedures relating to victim notification.

Chapter 8 provides procedures relating to consideration for parole and work release.

Chapter 9 is reserved for future rules relating to parole and work release rescission.

Chapter 10 provides the general parole and work release supervision procedures of the Board of Parole.

Chapter 11 provides the general parole revocation procedures of the Board of Parole.

Chapter 12 is reserved for future rules relating to work release revocation.

Chapter 13 provides the general parole discharge procedures of the Board of Parole.

Chapter 14 provides procedures relating to executive clemency.

Chapter 15 provides the general appeal procedures of the Board of Parole.

Any interested person may submit written comments on or before April 14, 1999, addressed to Executive Director, Board of Parole, 420 Keo Way, Holmes Murphy Building, Des Moines, Iowa 50309.

These rules are intended to implement Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202, and Iowa Code chapters 21, 22, 217, 248A, 902, 904A, 906, 908, and 910A.

These rules are expected to become effective on July 1, 1999.

Rescind 205—Chapters 1 to 15 and adopt the following new chapters in lieu thereof:

## CHAPTER 1

## ORGANIZATION AND GENERAL ADMINISTRATION

**205—1.1(904A) Board description.**

**1.1(1)** The board of parole is mandated by Iowa Code chapter 904A and consists of five members, including a chairperson.

**1.1(2)** Board members are appointed by the governor for staggered terms of four years and are subject to confirmation by the senate.

**1.1(3)** The board is responsible directly to the governor and is attached to the department of corrections for the purpose of receiving routine administrative and support services.

**1.1(4)** The board chairperson is appointed by the governor, and serves at the pleasure of the governor.

**1.1(5)** Vacancies in the board are filled in the same manner as regular appointments. Appointments to fill vacancies serve for the balance of the term.

**205—1.2(904A) Board responsibilities.** The statutory responsibilities of the board are:

**1.2(1)** Interviewing and considering inmates for parole or work release, and granting parole or work release.

**1.2(2)** Interviewing inmates according to board of parole administrative rules.

**1.2(3)** Gathering and reviewing information regarding new parole and work release programs being instituted or considered nationwide, and determining which programs may be useful to Iowa. Reviewing the current parole and work release programs and procedures used in Iowa on an annual basis.

**1.2(4)** Increasing the utilization of data processing and computerization to assist in the orderly conduct of the parole and work release system.

**1.2(5)** Conducting such studies of the parole and work release system as the governor and general assembly shall request.

**1.2(6)** Providing to public and private entities technical assistance and counseling related to the board's purposes.

**1.2(7)** Reviewing and making recommendations to the governor regarding all applications for reprieve, pardon, commutation of sentence, remission of a fine or forfeiture, and restoration of citizenship rights.

**1.2(8)** Maintaining a risk assessment program which shall provide risk analysis for the board.

**205—1.3(904A) Business location and hours.** The business office address is Holmes Murphy Building, 420 Keo Way, Des Moines, Iowa 50309, telephone (515)281-4818. Business hours are 8 a.m. to 4:30 p.m. Monday through Friday.

**205—1.4(904A) Board meetings.** The board may conduct the following meetings:

**1.4(1)** Business meeting. The board may meet each month to consider rules, procedure and other matters.

**1.4(2)** Public hearing. The board may conduct a public hearing to solicit input and comment on parole and work release procedures.

**1.4(3)** Board session. The board shall be in session each month at any location designated by the chairperson. A board session may include:

- a. Parole and work release interviews;
- b. Parole and work release case reviews;
- c. Parole rescission hearing;
- d. Parole discharge reviews;
- e. Executive clemency reviews.

**1.4(4) Quorum.**

a. A majority of the members of the board constitutes a quorum except as provided herein.

b. The chairperson shall designate panels composed of at least three board members to conduct board sessions except as provided herein.

**1.4(5)** Majority vote. All questions shall be decided by a majority vote of the members except as provided herein.

**1.4(6)** Parliamentary authority. Robert's Rules of Order, current edition, shall govern the conduct of all business meetings of the board except as provided herein.

**1.4(7)** Minutes. The board shall keep copies of the minutes of board meetings on file at the business office. The list of individuals considered by the board for action shall constitute the minutes of a board session.

**1.4(8)** Public notice and agenda. The board shall establish the date, time, and location of all meetings. The board shall give public notice of all meetings pursuant to Iowa Code chapter 21. The board shall mail copies of public meeting notices and tentative agenda to news media that have so requested. When it is determined that an emergency meeting is required, the board shall notify the news media as soon as

## PAROLE BOARD[205](cont'd)

the need for an emergency meeting has been decided. The nature of the emergency shall be stated in the minutes.

**1.4(9) Public access to meetings.** Members of the public have access to board meetings as provided in Iowa Code chapter 21. Persons wishing to appear before the board shall submit their request to the business office not less than three days prior to the business meeting. Members of the public wishing to attend board meetings conducted in department of corrections penal institutions should consult, in advance, department of corrections administrative rules relating to visitation and public access.

**1.4(10) Electronic meetings.** The board may conduct a meeting by electronic means as provided in Iowa Code section 21.8.

These rules are intended to implement Iowa Code chapter 904A.

## CHAPTER 2 AGENCY PROCEDURE FOR RULE MAKING

The board of parole hereby adopts the agency procedure for rule making segment of the Uniform Rules on Agency Procedure which are printed in the first volume of the Administrative Code with the following amendments:

**2.3(2) Anticipated rule making.** In lieu of the words "(commission, board, council, director)", the words "board of parole" should be inserted.

**2.5(1) Written comments.** In lieu of the words "(identify office and address)", the words "Executive Director of the Board of Parole, 420 Keo Way, Holmes Murphy Building, Des Moines, Iowa 50309" should be inserted.

**2.6(2) Mailing list.** In lieu of the words "(designate office)", the words "Board of Parole, 420 Keo Way, Holmes Murphy Building, Des Moines, Iowa 50309" should be inserted.

**2.11(1) General.** In lieu of the words "(specify the office and address)", the words "executive director of the board of parole" should be inserted.

These rules are intended to implement Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202.

## CHAPTER 3 PETITIONS FOR RULE MAKING

The board of parole hereby adopts the petitions for rule making segment of the Uniform Rules on Agency Procedure which are printed in the first volume of the Iowa Administrative Code with the following amendments:

**205—3.1(17A) Petition for rule making.** In lieu of the words "(designate office)", the text should read "420 Keo Way, Holmes Murphy Building, Des Moines, Iowa 50309".

In lieu of the words "(AGENCY NAME)", the heading on the petition form should read:

### BEFORE THE BOARD OF PAROLE OF THE STATE OF IOWA

**205—3.3(17A) Inquiries.** Inquiries concerning the status of a petition for rule making may be made to the Executive Director of the Board of Parole, 420 Keo Way, Holmes Murphy Building, Des Moines, Iowa 50309.

These rules are intended to implement Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202.

## CHAPTER 4 DECLARATORY ORDERS

The board of parole hereby adopts the declaratory orders segment of the Uniform Rules on Agency Procedure which are printed in the first volume of the Iowa Administrative Code with the following amendments:

**205—4.1(17A) Petition for declaratory order.** In lieu of the words "(designate agency)" the text should read "board of parole". In lieu of the words "(designate office)", the text should read "420 Keo Way, Holmes Murphy Building, Des Moines, Iowa 50309". In lieu of the words "(AGENCY NAME)", the heading on the petition form should read:

### BEFORE THE BOARD OF PAROLE OF THE STATE OF IOWA

**205—4.2(17A) Notice of petition.** Within 15 days after receipt of a petition for a declaratory order, the board of parole shall give notice of the petition to all persons not served by the petitioner pursuant to 205—4.6(17A) to whom notice is required by any provision of law. The board of parole may also give notice to any other persons.

**205—4.3(17A) Intervention.**

**4.3(1)** Persons who qualify under any applicable provision of law as an intervenor and who file a petition for intervention within 25 days of the filing of a petition for declaratory order shall be allowed to intervene in a proceeding for a declaratory order.

**4.3(2)** In lieu of the words "(designate agency)" the text should read "the board of parole".

**4.3(3)** In lieu of the words "(designate office)" the text should read "Holmes Murphy Building, 420 Keo Way, Des Moines, Iowa 50309-1638". In lieu of the words "(designate agency)" the text should read "Board of Parole". In lieu of the words "(AGENCY NAME)" the text should read:

### BEFORE THE BOARD OF PAROLE OF THE STATE OF IOWA

**205—4.4(17A) Briefs.** In lieu of the words "(designate agency)" the text should read "board of parole".

**205—4.5(17A) Inquiries.** Inquiries concerning the status of a petition for a declaratory ruling may be made to the Executive Director of the Board of Parole, 420 Keo Way, Holmes Murphy Building, Des Moines, Iowa 50309.

**205—4.6(17A) Service and filing of petitions and other papers.**

**4.6(2)** Filing—when required. In lieu of the words "(specify office and address)" the text should read "Board of Parole, Holmes Murphy Building, 420 Keo Way, Des Moines, Iowa 50309-1638". In lieu of the words "(agency name)" the text should read "board of parole".

**4.6(3)** Method of service, time of filing, and proof of mailing. Method of service, time of filing and proof of mailing shall be as provided in the contested cases segment of the Uniform Administrative Rules.

**205—4.7(17A) Consideration.** In lieu of the words "(designate agency)" the text should read "board of parole".

**205—4.8(17A) Action on petition.**

**4.8(1)** In lieu of the words "(designate agency head)" the text should read "the chairperson of the board of parole".

**4.8(2)** The date of issuance of an order or of a refusal to issue an order is as defined in the contested cases segment of the Uniform Administrative Rules.

## PAROLE BOARD[205](cont'd)

**205—4.9(17A) Refusal to issue order.** In lieu of the words “(designate agency)” the text should read “board of parole”.

**205—4.12(17A) Effect of a declaratory order.** In lieu of the words “designate agency” the text should read “board of parole”.

These rules are intended to implement Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202.

CHAPTER 5  
FAIR INFORMATION AND PRACTICES

The board of parole hereby adopts, with the following exceptions and amendments, the Uniform Rules on Agency Procedure relating to public records and fair information practices which are printed in the first volume of the Iowa Administrative Code.

**205—5.1(17A,22) Definitions.** As used in this chapter:

“Agency” means the board of parole.

“Confidential records” are records, as defined under Iowa Code sections 22.7, 22.8, 904.601, 904.602 and 904.603, which are not disclosed to members of the public except by court order. This includes records which the board is prohibited by law from making available for inspection by members of the public and those exempt records which the board has determined not to disclose to members of the public.

“Open records” are those records which are not authorized or required to be kept confidential under Iowa Code sections 22.7, 22.8, 904.601, 904.602 or any other provision of the law.

**205—5.3(17A,22) Requests for access to records.**

**5.3(1) Location of record.** A request for access to a record should be directed to the office where the record is kept. Records of current inmates, work releasees and parolees are maintained in the Board of Parole Office, Holmes Murphy Building, 420 Keo Way, Des Moines, Iowa 50309-1638, (515)281-4818.

**5.3(2) Office hours.** Open records shall be made available during all customary office hours, which are 8 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays.

**5.3(4) Response to requests.** The custodian is authorized to grant or deny access to the record according to the provisions of Iowa Code chapter 22, Iowa Code sections 904.601, 904.602, and 904.603 and this chapter. The decision to grant or deny access may be delegated to one or more designated employees. Unless the size or nature of the request requires time for compliance, the agency shall comply with the request as soon practicable. However, access to such a record may be delayed for one of the purposes authorized by Iowa Code section 22.8(4) or 22.10(4) or good cause. The agency shall promptly inform the requester of the reason for the delay. A request to review a confidential record shall be in writing and shall enumerate the specific grounds justifying access to the confidential record and to provide any proof necessary to establish relevant facts, request prior to receiving access to the record.

**5.3(7) Fees.**

c. Supervisory fee. An hourly fee may be charged for actual agency expenses in supervising the examination and copying of requested records when the supervision time required is in excess of five minutes. That hourly fee shall not be in excess of the hourly wage of an agency employee who ordinarily would be appropriate and suitable to perform this supervisory function.

**205—5.6(17A,22) Procedure by which additions, dissents or objections may be entered into certain records.** In lieu

of the words “(designate office)” the text should read the “board of parole”.

**205—5.7(17A,22) Consensual disclosure of confidential records.**

**5.7(1) Consent to disclose by a subject individual.** To the extent allowed by law, the subject may consent in writing to agency disclosure of confidential records as provided in rule 205—5.4(17A,22).

**5.7(2) Complaints to public officials.** A letter from a subject of confidential record to a public official which seeks the official's intervention on behalf of the subject in a matter that involves the agency may, to the extent permitted by law, be treated as an authorization to release sufficient information about the subject to the official to resolve the matter.

**5.7(3) Obtaining information from a third party.** The board is required to obtain information to assist in making decisions regarding classification, programming, security and administrative management operational decision. Requests to third parties for this information may involve the release of confidential information about individuals. Except as provided by law, the board may make these requests only when the individual has authorized the release.

**205—5.9(17A,22) Routine use.** To the extent allowed by law, the following uses are considered routine uses of all agency records:

**5.9(1) Disclosure to those officers, employees, and agents of the agency who have a need for the record in the performance of their duties.** The custodian of the record may, upon request of any officer or employee, or on the custodian's own initiative, determine what constitutes legitimate need to use confidential records.

**5.9(2) Disclosure of information indicating an apparent violation of the law to appropriate law enforcement authorities for investigation and possible criminal prosecution, civil court action, or regulatory order.**

**5.9(3) Disclosure to the department of inspections and appeals for matters in which it is performing services or functions on behalf of the agency.**

**5.9(4) Transfers of information within the agency, to other state agencies, or to local units of government as appropriate to administer the program for which the information is collected.**

**5.9(5) Information released to staff of federal and state entities for audit purposes or for purposes of determining whether the agency is operating a program lawfully.**

**5.9(6) Any disclosure specifically authorized by the statute under which the record was collected or maintained.**

**205—5.10(17A,22) Disclosures without the consent of the subject.**

**5.10(1) Open records are routinely disclosed without the consent of the subject.**

**5.10(2) To the extent allowed by law, disclosure of confidential records may occur without the consent of the subject. Following are instances where disclosure, if lawful, will generally occur without notice to the subject:**

a. For a routine use as permitted by law and in the particular record system.

b. To a recipient who has provided the agency with advance written assurance that the record will be used solely as a statistical research or reporting record; provided that the record is transferred in a form that does not identify the subject.

c. To another government agency or to an instrumentality of any governmental jurisdiction within or under the control of the United States for a civil or criminal law enforce-

## PAROLE BOARD[205](cont'd)

ment activity if the activity is authorized by law, and if the head of such government agency or instrumentality has submitted a written request to the agency specifying the record desired and the law enforcement activity for which the record is sought.

d. To an individual pursuant to a showing of compelling circumstances affecting the health or safety of any individual if a notice of the disclosure is transmitted to the last-known address of the subject.

e. To the legislative fiscal bureau under Iowa Code section 2.52.

f. Disclosures in the course of employee disciplinary proceedings.

g. In response to a court order or subpoena.

**205—5.11(17A,22) Release to subject.**

**5.11(1)** The subject of a confidential record may file a written request to review confidential records about that person. However, the board need not release the following records to the subject:

a. The identity of a person providing information to the agency need not be disclosed directly or indirectly to the subject of the information when the information is authorized to be held confidential pursuant to Iowa Code sections 22.7(18) and 904.602.

b. Records need not be disclosed to the subject when they are the work product of an attorney or are otherwise privileged.

c. Peace officers' investigative reports may be withheld from the subject, except as required by the Iowa Code.

d. As otherwise authorized by law.

**5.11(2)** Where a record has multiple subjects with interest in the confidentiality of the record, the board may take reasonable steps to protect confidential information relating to another subject.

**205—5.12(17A,22) Availability of records.**

**5.12(1)** Open records. Board records are open for public inspection and copying unless otherwise prohibited by current rule of law.

**5.12(2)** Confidential records. The following records may be kept confidential. Records are listed by category, according to the legal basis for withholding them from public inspection.

a. Sealed bids received prior to the time set for public opening of bids; (Iowa Code section 72.3)

b. Tax records made available to the agency; (Iowa Code section 422.17, 422.20)

c. Minutes of closed meetings of a government body; (Iowa Code section 21.5(4))

d. Identifying details in final orders, decisions and opinions to the extent required to prevent a clearly unwarranted invasion of personal privacy or trade secrets under Iowa Code section 17A.3(1)"d";

e. Those portions of agency staff manuals, instructions, or other statements issued which set forth criteria or guidelines to be used by agency staff in auditing, in making inspections, in settling commercial disputes, or negotiating commercial arrangements, or in the selection or handling of cases, such as operational tactics or allowable tolerance or criteria for the defense, prosecution or settlement of cases, when disclosure of these statements would:

(1) Enable law violators to avoid detection;

(2) Facilitate disregard of requirements imposed by law;

or

(3) Give a clearly improper advantage to persons who are in an adverse position to the agency. (Iowa Code section 22.7)

f. Records which constitute attorney work product, attorney-client communications, or which are otherwise privileged. Attorney work product is confidential under Iowa Code sections 22.7(4), 622.10 and 622.11, Iowa Rules of Civil Procedure 122(c), Federal Rule of Civil Procedure 26(b)(3), and case law. Attorney-client communications are confidential under Iowa Code sections 622.10 and 622.11, the rules of evidence, and the Code of Professional Responsibility and case law.

g. Other records made confidential by law.

**205—5.13(17A,22) Personally identifiable information.**

**5.13(1)** This rule describes the nature and extent of personally identifiable information which is collected, maintained and retrieved by the agency by personal identifier in record systems as defined in this rule. For each record system, this rule describes the legal authority for the collection of that information, the means of storage of that information and indicates whether a data processing system matches, collates, or permits the comparison of personally identifiable information in one record system with personally identifiable information in another record system.

**5.13(2)** Litigation files. These files or records contain information regarding litigation or anticipated litigation, which includes judicial and administrative proceedings. The records include briefs, depositions, docket sheets, documents, correspondence, attorney notes, memoranda, research materials, witness information, investigation materials, information compiled under the direction of the attorney and case management records. The files contain materials which are confidential as attorney work product and attorney-client communications. Some materials are confidential under other applicable provisions of law or because of a court order. Persons wishing copies of pleadings and other documents filed in litigation should obtain these from the clerk of the appropriate court which maintains the official copy.

**5.13(3)** Personnel files. The agency maintains files containing information about employees, families and dependents, and applicants for positions with the agency. The files include payroll records, biographical information, medical information relating to disability, performance reviews and evaluations, disciplinary information, information required for tax withholding, information concerning the employer-employee relationship. Some of this information is confidential under Iowa Code section 22.7(11).

**205—5.14(17A,22) Other groups of records available for public inspection—policies, procedures (excluding security) and meeting minutes.** This rule describes groups of records maintained by the board other than record systems as previously defined. These records are routinely available to the public. However, the board's file of these records may contain confidential information, as discussed in rule 5.12(17A,22). The following records are stored both as hard copy and in automated data processing systems unless otherwise noted.

**5.14(1)** Rule making. Rule-making records may contain information about individuals making written or oral comments on proposed rules. This information is collected pursuant to Iowa Code section 17A.4.

**5.14(2)** Board meeting records. Agendas, minutes and materials presented to the board are available from the office of the director except those records concerning closed sessions which are exempt from disclosure under Iowa Code

## PAROLE BOARD[205](cont'd)

section 21.5(4), or which are otherwise confidential by law. Board meeting records contain information about people who participate in meetings. The information is collected pursuant to Iowa Code section 21.3. This information is not retrieved by individual identifier.

**5.14(3) Publications.** News releases, annual reports, project reports, board newsletters, etc., are available from the board office. Board news releases, project reports, and newsletters may contain information about individuals, including board staff or members of the board councils or committees. This information is not retrieved by individual identifier.

**5.14(4) Statistical reports.** Periodic reports of the board for various board programs are available from the board office. Statistical reports do not contain personally identifiable information.

**5.14(5) Grants.** Records on persons receiving grants for various projects or programs are available through the office of the director. These records may contain information about employees or a grantee. This information is not retrieved by individual identifier and is not stored on an automated data processing system. The information is collected under the authority of Iowa Code chapter 904.

**5.14(6) Published materials.** The board uses many legal and technical publications in its work. The public may inspect these publications upon request. Some of these materials may be protected by copyright law. These records are hard copy only.

**5.14(7) Policy manuals.** The board employees' manual, containing procedures describing the board's regulations and practices, is available. Policy manuals do not contain information about individuals.

**5.14(8) Other records.** All other records that are not exempted from disclosure by law.

**205—5.15(17A,22) Applicability.** This chapter does not:

**5.15(1)** Require the agency to index or retrieve records which contain information about individuals by that person's name or other personal identifier.

**5.15(2)** Make available to the general public records which would otherwise not be available under the public records law, Iowa Code chapter 22.

**5.15(3)** Govern the maintenance or disclosure of, notification of, or access to records in the possession of the agency which are governed by the regulations of another agency.

**5.15(4)** Apply to grantees, including local governments or subdivisions thereof, administering state-funded programs, unless otherwise provided by law or agreement.

**5.15(5)** Make available records compiled by the agency in reasonable anticipation of court litigation or formal administrative proceedings. The availability of such records to the general public or to any subject individual or party to such litigation or proceedings shall be governed by applicable legal and constitutional principles, rules of discovery, evidentiary privileges and applicable regulations of the agency.

These rules are intended to implement Iowa Code section 22.11 and Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202.

## CHAPTER 6

## PUBLIC COMMUNICATIONS AND RECORDS

**205—6.1(22) General.** The public may obtain information or make submissions to the board through the business office.

**205—6.2(22) Communications from persons other than victims.**

**6.2(1) Written communication preferred.** The board requests that all communications by a person other than a victim, as defined in rule 205—7.1(910A), concerning an inmate, parolee, or work releasee be in writing so that the communication may readily be made a permanent part of the case file. Oral communications concerning an inmate, parolee, or work releasee by a person other than a victim will be heard only with the consent of the board.

**6.2(2) Disclosure to inmate.** The board shall place a written communication concerning an inmate, parolee, or work releasee in the case file. The board shall inform an inmate, parolee, or work releasee when a communication adverse to the inmate, parolee, or work releasee will be considered in making a parole or work release decision and shall disclose to the inmate, parolee, or work releasee the substance of any opinion regarding their status unless withholding the information is requested by the person providing the statement or oral communication and the board determines that the release of the information would endanger the public's safety.

**205—6.3(22) Examination of board records.**

**6.3(1) General.** The public may examine and copy board public records pursuant to Iowa Code chapter 22 at the board's business office. An individual wishing to examine or copy a record must schedule an appointment with the board's business office a minimum of three working days prior to the date on which the individual will review the information in question. When making the appointment, the requesting party shall specifically indicate the information desired. Complete inmate files will not be released except by court order. When photocopies of documents or copies of audio or video tapes are provided, the board may require the requester to pay the cost of the copies plus a reasonable charge for copying. These charges are to be determined by the lawful custodian. The board may refer anyone requesting information which has been generated by a source outside the board to the agency or individual which generated the information.

**6.3(2) Lawful custodian.** The board shall designate the chairperson or the chairperson's designee as the lawful custodian of the records who shall be responsible for implementing the board's rules regarding disclosure of public records, coordination of staff in this regard and generally ensuring compliance by the staff with public records disclosure requirements.

**205—6.4(217) Disclosure of information regarding inmates and parolees.**

**6.4(1) Public information.** The following information regarding individuals receiving services from the department of corrections or a district department is public information and may be disclosed by the board to anyone who requests the information, except that information shall be limited to the offense for which an individual was last convicted:

- a. Name.
- b. Age and date of birth.
- c. Sex.
- d. Status (inmate, parolee, or probationer).
- e. Location, except home street address.
- f. Duration of supervision.
- g. Offense or offenses for which the individual was placed under supervision.
- h. County of commitment.
- i. Arrest and detention orders.

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- j. Physical description.
  - k. Type of services received, except medical, psychiatric, psychological, substance abuse, gambling and sex offender treatment information.
  - l. Disciplinary reports and decisions which have been referred to the county attorney or prosecutor for prosecution, and the following information of all other disciplinary reports:
    - (1) The name of the subject of the investigation.
    - (2) The alleged infraction involved.
    - (3) The finding of fact and the penalty, if any, imposed as a result of the infraction.
  - m. Inmate risk assessment score.
- 6.4(2)** Confidential information regarding inmates and parolees. The following information regarding individuals receiving services from the department of corrections or a district department is confidential information and shall not be disclosed to the public:
- a. Home street address of the individual receiving services or that individual's family.
  - b. Department evaluations.
  - c. Medical, psychiatric, psychological, substance abuse treatment, gambling and sex offender treatment information.
  - d. Names of associates or accomplices.
  - e. Name of employer.
  - f. Social security number.
  - g. Prior criminal history including information on offenses where no conviction occurred.
  - h. Family and personal history.
  - i. Financial information.
  - j. Information from disciplinary reports and investigations other than identified in subrule 6.4(1).
  - k. Investigations by the department of corrections or other agencies which are contained in the individual's file.
  - l. Department of corrections committee records containing confidential information.
  - m. Pre-sentence investigations as provided under Iowa Code chapter 901.
  - n. Pretrial information that is not otherwise available in public court records or proceedings.
  - o. Correspondence directed to the board or the department of corrections from an individual's family, victims, or employers of a personal or confidential nature as determined by the board or the department.
  - p. Communications to the board by members of the public other than public officials to the extent that the board believes that those members of the public would be discouraged from making the communications if the communications were available for general public examination.
  - q. Victim registrations pursuant to 205—Chapter 7. A record containing information which is both public and confidential which is reasonably segregable shall not be confidential after deletion of the confidential information.
- 6.4(3)** The board may disclose confidential information described in subrule 6.4(2) as follows:
- a. The board may release statistical information which does not identify particular individuals.
  - b. The board may disclose information to the department of corrections; district departments; public officials for use in connection with their duties relating to law enforcement, audits, and other purposes directly connected with the administration of their programs; and public and private agencies providing services to individuals. Those receiving information shall be subject to the same standards as the board in dissemination and redissemination of information.
  - c. The board may disclose information when necessary for civil or criminal court proceedings pursuant to court or-

der. The court may seek to have the court limit disclosure of confidential information.

d. The board shall give a supervised individual or former supervised individual access to the individual's own records in the custody of the board except for those records that could result in physical or psychological harm to the individual or others, and disciplinary reports. Upon written authorization by a supervised individual or former supervised individual, the board may release information to any party included in the written release. This information is restricted to that which the individual can obtain.

**205—6.5(904A) Inmate requests regarding risk assessment score.** An inmate may request information regarding the inmate's risk assessment score from the board of parole. However, because an inmate's risk assessment score will not change unless the inmate is released from and later returned to prison, the board shall not be required to respond to more than one request regarding risk assessment score per commitment to prison from each inmate.

These rules are intended to implement Iowa Code chapter 22 and Iowa Code sections 904.601, 904.602 and 904A.4.

## CHAPTER 7 VICTIM NOTIFICATION

### **205—7.1(910A) Definitions.**

"Notification" means mailing by regular mail or providing for hand delivery of appropriate information or papers. However, this notification procedure does not prohibit an agency from providing appropriate information to a registered victim by telephone.

"Parole interview" means an interview conducted by the board to consider an inmate's prospects for parole pursuant to Iowa Code section 906.5.

"Registered" means having provided the county attorney with the victim's written request for registration and current mailing address and telephone number.

"Victim" means a person who has suffered physical, emotional, or financial harm as the result of a public offense, other than a simple misdemeanor, committed in this state. The term also includes the immediate family members of a victim who died or was rendered incompetent as a result of the offense or who was under 18 years of age at the time of the offense.

"Violent crime" means a forcible felony, as defined in Iowa Code section 702.11, and includes any other felony or aggravated misdemeanor which involved the actual or threatened infliction of physical or emotional injury on one or more persons.

**205—7.2(910A) Victim registration.** A victim may register by filing a written request-for-registration form with the county attorney. The county attorney shall notify the victim in writing and advise them of their registration and rights. The county attorney shall provide the appropriate offices, agencies, and departments, including the board, with a registered victim list. The board shall determine if an individual will be accepted as a registered victim. This determination shall be based solely upon criteria set out in the Code of Iowa. A registered victim is responsible for keeping the victim's address and telephone number current with the board, in order to ensure timely notification.

**205—7.3(910A) Victim notification.** The board shall notify a registered victim of a violent crime not less than 20 days prior to conducting a hearing at which the board will interview the inmate, and shall inform the victim that the victim

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may submit the victim's opinion concerning the release of the inmate in writing prior to the hearing, or may appear personally or by counsel at the hearing to express an opinion concerning the inmate's release.

**205—7.4(910A) Notification of decision.** Whether or not the victim appears at the hearing or expresses an opinion concerning the offender's release on parole, the board shall notify the victim of the board's decision regarding release of the offender.

**205—7.5(910A) Written opinions concerning release.** A registered victim may submit a written opinion concerning the release of the inmate at any time by mailing the opinion to the business office. The written opinion shall be made a permanent part of the inmate's file and shall be reviewed when the board considers the inmate's prospects for parole.

**205—7.6(910A) Appearances at parole interviews.**

**7.6(1)** A registered victim of a violent crime may appear personally or by counsel at a parole interview to express an opinion concerning the release of the inmate.

**7.6(2)** If a registered victim of a violent crime intends to appear at a parole interview, the victim must comply with the rules of the department of corrections that require a visitor to a state institution to give prior notice of the intended visit and to receive approval for the visit.

**7.6(3)** A registered victim of a violent crime, or victim's counsel, shall appear at the institution at the time set forth in the notice of parole interview. The victim or counsel shall inform institutional personnel of the purpose of the appearance. Institutional personnel shall coordinate the appearance of the victim or victim's counsel with the board. At the appearance, the board shall permit the victim or victim's counsel to express an opinion concerning the release of the inmate.

**205—7.7(910A) Disclosure of victim information.** Information regarding a registered victim, as well as the existence of a registered victim in a particular case, is confidential and shall not be disclosed to the public. A victim's registration, and the substance of any opinion submitted by the victim regarding the inmate's release, shall be disclosed to the inmate, unless the victim requests that the information be withheld and the board determines that releasing the information would endanger the safety of the person providing the statement of testimony.

These rules are intended to implement Iowa Code chapter 910A.

## CHAPTER 8

## PAROLE AND WORK RELEASE CONSIDERATION

**205—8.1(906) Purpose of parole and work release considerations.** The board shall determine whether there is reasonable probability that an inmate committed to the custody of the department of corrections who is eligible for parole or work release can be released without detriment to the community or the inmate. The board shall consider the best interests of society and shall not grant parole or work release as an award of clemency.

**205—8.2(906) Parole and work release eligibility.**

**8.2(1)** Mandatory sentences. The board shall not grant parole to an inmate serving a mandatory minimum sentence. The board shall not grant work release to an inmate serving a mandatory minimum sentence unless the inmate is within six months of completing the mandatory minimum portion of the sentence. A parole or work release granted contrary to

this rule shall be rescinded. Mandatory sentences are as follows:

a. A life sentence imposed for conviction of a Class "A" felony pursuant to Iowa Code section 902.1;

b. A mandatory minimum sentence imposed for use of a firearm pursuant to Iowa Code section 902.7;

c. A mandatory minimum sentence imposed for violation of uniform controlled substance provisions pursuant to Iowa Code section 204.406 or 204.413;

d. A mandatory minimum sentence imposed for being an habitual offender pursuant to Iowa Code section 902.8;

e. A mandatory minimum sentence imposed for a prior forcible felony pursuant to Iowa Code section 906.5.

**8.2(2)** Parole and work release while on patient status. Generally, the board will not grant parole or work release to an inmate on patient status.

**8.2(3)** Parole to detainer. The board may grant parole to an inmate against whom a detainer has been placed by another state. Generally, the board will not parole an inmate to a detainer that is solely for prosecution.

**8.2(4)** Parole to other states. The board may grant parole to another state pursuant to the provisions of the interstate parole and probation compact set forth in Iowa Code chapter 907A.

**205—8.3(904A) Inmate orientation.** Reserved.

**205—8.4(906) Prior forcible felony mandatory minimum sentence.** The board shall deny parole or work release to an inmate who is serving a mandatory minimum sentence pursuant to Iowa Code section 906.5.

**205—8.5(904A) Risk assessment.** The board shall assess the risk of an inmate committed to the custody of the department of corrections. The board shall utilize a risk assessment instrument approved by the board by resolution.

**205—8.6(906) Parole and work release considerations.**

**8.6(1)** Case reviews. The board may review the records of an inmate committed to the custody of the department of corrections and consider the inmate's prospects for parole or work release at any time. The board shall only notify an inmate granted parole or work release, except as provided in 8.6(3).

**8.6(2)** Interviews. The board may interview an inmate committed to the custody of the department of corrections at any time.

**8.6(3)** The board shall review the status of each inmate as directed by the Iowa Code, and shall provide the inmate with notice of its parole or work release decision. After an inmate has been granted work release, the board shall review the inmate's status at least annually from the date of the decision to grant work release.

**8.6(4)** Class "A" felons, and Class "B" felons serving a sentence of more than 25 years, are excepted from the annual review requirement of 8.6(3).

**8.6(5)** Inmates serving a mandatory minimum sentence are excepted from the annual review requirements of 8.6(3) until such time as the mandatory minimum has expired.

**8.6(6)** Corrections initiated review. The department of corrections may recommend an inmate for parole or work release consideration at any time. The board shall discuss such a recommendation with corrections staff during the next regularly scheduled board session at the institution where the inmate in question is incarcerated. The board shall not interview the inmate unless such an interview is requested by the board.

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**205—8.7(906) Parole and work release information.** The board shall notify the department of corrections or a district department when an inmate is to be considered for parole or work release. The receipt of notice by the department of corrections or the district department shall constitute a request for updated information on the inmate. The board shall request information required for parole or work release decision making. The department of corrections or the district department shall furnish updated information to the board.

**205—8.8(906) Interview notice.** The board or the board's designee shall notify an inmate to be interviewed for parole or work release consideration of the time and purpose of the interview. Not less than 20 days prior to the interview, the board shall also notify the department of corrections of the scheduling of the interview, and the department shall make the inmate available to the board at the inmate's institutional residence as scheduled in the notice. However, if health, safety, or security conditions require moving the inmate to another institution or facility prior to the scheduled interview, the department of corrections shall so notify the board.

**205—8.9(906) Continuance.** The board may reschedule or continue a parole or work release interview upon its own motion or upon a showing of good cause.

**205—8.10(906) Factors considered in parole and work release decision.**

**8.10(1)** The board may consider the following factors and others deemed relevant to the parole or work release decision:

- a. Previous criminal record;
- b. Nature and circumstances of the offense;
- c. Recidivism record;
- d. Convictions or behavior indicating a propensity for violence;
- e. Participation in institutional programs, including academic and vocational training;
- f. Psychiatric and psychological evaluations;
- g. Length of time served;
- h. Evidence of serious or habitual institutional misconduct;
- i. Success or failure while on probation;
- j. Prior parole or work release history;
- k. Prior refusal to accept parole or work release;
- l. History of drug or alcohol use;
- m. A parole plan formulated by the inmate;
- n. General attitude and behavior while incarcerated;
- o. Risk assessment.

**8.10(2)** Psychological and psychiatric evaluations. The board may request a complete psychiatric or psychological evaluation of an inmate whenever, in the opinion of the board, it would be beneficial to its decision. The board will routinely request an evaluation of an inmate convicted of a crime involving sexual abuse or personal violence, or of an inmate who has committed assaults or violent acts while incarcerated.

**205—8.11(906) Information disclosure to inmate.**

**8.11(1)** The board shall consider only information that has been reviewed by the inmate, except where the board deems such review not feasible. The information shall be considered only if the following safeguards are followed:

- a. The staff of the department of corrections shall discuss the information with the inmate and disclose to the inmate any factual allegations if the disclosure can be done in a manner that protects confidential sources.

Factual allegations shall include but not be limited to:

- (1) Any statements attributed to the inmate;
- (2) Any allegations of criminal or antisocial behavior with or without court conviction from within or without the institution;
- (3) Any allegations of threats made by the inmate;
- (4) Any allegations of drug addiction or alcoholism;
- (5) Any allegations regarding family history, employment or education;
- (6) Disciplinary record at the institution.

b. If any information from outside institutions under the supervision of the department of corrections is to be considered by the board, and it is necessary to protect the source, the inmate shall be informed of at least the following:

- (1) The general substance of the information;
- (2) The number of communications;
- (3) The type of communications.

The inmate shall be given the opportunity to respond to information.

c. The inmate's reports from institutions under the supervision of the department of corrections, including reception reports, progress reports, medical reports, and social information or reports, should, to the extent possible, be structured so as to separate opinion from factual information. The factual information shall be made available for review by the inmate; opinion information shall be confidential. Psychiatric or psychological test results or diagnosis shall be deemed confidential.

**8.11(2)** A parole liaison officer may review any file and investigate any facts, allegations, opinions, or comments contained therein. If communications adverse to the inmate or parolee are considered by the board, the inmate or parolee shall be informed of the fact.

**205—8.12(906) Interview procedure.** The board panel shall interview the inmate and consider the inmate's records with respect to history, current situation, parole and work release prospects, and other pertinent matters. The panel shall give the inmate ample opportunity to express views and present materials.

**205—8.13(906) Case review procedure.** The board panel may consider the inmate's records and other information with respect to history, current situation, parole and work release prospects, and other pertinent matters. A case review may take place at any time and is in addition to any other required review.

**205—8.14(906) Conduct at parole proceedings.**

**8.14(1)** Parole proceedings shall be open to the public except as otherwise necessary or proper.

**8.14(2)** Conduct of inmate.

a. Conduct of the inmate shall be in a manner consistent with decorum appropriate for a participant in a public meeting of a governmental body.

b. An inmate may not orally or otherwise communicate with spectators or others present at the parole proceeding except as directed by the panel or board.

c. The inmate should speak to the panel or board or counselor only when asked a question or directed otherwise to do so.

d. Each inmate will be given an opportunity to make an independent statement to the panel or board at some point during the parole proceeding. The panel or board may limit this statement in any manner as to topic or time. Specifically subject to this limitation will be persons who have no realistic grounds to believe a parole will be granted; i.e., those with mandatory minimum sentences, those serving life terms, or

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those having served short times relative to the severity of their crimes and length of their sentences.

e. Failure to comply with the direction of the panel or board in limiting statements, in communicating with persons present at the parole proceeding, or any absence of decorum which could disrupt or delay the proceeding will result in a forfeiture of the right to an interview, and a request by the board to have the institutional staff remove the inmate.

f. An inmate who forfeits the right to an interview for reasons under 8.14(2)"e" or for any other reason shall not be interviewed again until the inmate's next annual review except that the inmate may request an earlier interview. The request is to be made through the board liaison officer, the counselor or other institutional staff member, or the ombudsman, together with assurance by the inmate that no repeat of the offending conduct or other offending conduct will occur. A reinterview is subject to the discretion of the panel or board.

#### 8.14(3) Conduct of spectators.

a. Spectators may not participate in the parole proceedings. The number of spectators will be limited by the number of seats provided. Only board staff or institutional staff will be allowed to stand during the interviews or between interviews, except during breaks of the panel or board or as necessary to enter and leave during times designated by the panel. An exception will be made for television camera operators.

b. Spectators may not enter or leave the room during interviews or between interviews, except that the board panel will designate times when persons may enter and leave. This will be done at reasonable intervals; and may be between interviews even though the board does not take a break.

c. Entering and leaving the interview room before and after the interview sessions and during breaks in the interview sessions shall be subject to the restrictions imposed by the staff of the institution at which the session is being held.

d. Spectators shall make no utterances which are intended to be or can be heard by the inmate or the panel. This includes any conversation among spectators.

e. Spectators shall conduct themselves in a manner consistent with decorum appropriate for a public meeting of a governmental body.

f. Any activity deemed inappropriate by the panel or institutional staff under the guidelines in the rules may result in a request by the panel or institutional staff for the offending party or parties to leave. Warnings for inadvertent or minor misconduct may or may not be given the first time and any subsequent offending activity will result in a request to leave. Refusal to leave upon request will result in a request by the panel to have the person or persons removed by the institutional staff.

All spectator places shall be on a first-come, first-served basis in accord with the rules of the institution or the department of corrections.

g. Spectators who leave during a time designated for entering or leaving or during a short break by the panel may retain their place if the person returns at the next time designated for that purpose. A person does not retain a place at the hearing over breaks taken for lunch, dinner, or overnight.

#### 8.14(4) Conduct of the media.

a. General. Broadcasting, televising, recording and photographing will be permitted in the interview room during open sessions of the board or panels, including recesses between sessions, under the following conditions:

(1) Permission first shall have been granted by the institution or department of corrections, which may prescribe con-

ditions and restrictions for bringing equipment into areas of the institution.

(2) Media coverage is prohibited of any proceeding which is held in closed session under Iowa law.

(3) The quantity and types of equipment permitted in the interview room shall be subject to the discretion of the panel or board within the guidelines in these rules, and subject to the permission of the institution or department of corrections.

(4) Notwithstanding the provisions of any of these procedural or technical rules, the panel or board may permit the use of other equipment provided the application for variance is made in advance. Ruling upon the variance application shall be in the discretion of the panel or board, subject to permission of the institution or department of corrections to bring in or move equipment.

(5) The panel or board may limit or terminate photographic or electronic media coverage of any or all media participants at any time during the proceedings in the event the panel or board finds that rules established under this chapter or additional rules imposed by the institution or department of corrections have been violated.

(6) The rights of motion picture and electronic coverage provided herein may be exercised only by persons or organizations which are part of the news media, except that individuals may use sound tape recorders.

b. Advanced notice of coverage. All requests by representatives of the news media to use television cameras or electronic sound recording equipment in the interview room shall be made to the institution in accord with department of corrections rules.

c. Equipment specifications. Equipment to be used by the media or public in interview rooms or meeting rooms during interview proceedings or board meetings held at the institutions must be unobtrusive and must not produce distracting sound. In addition, the equipment must satisfy the following criteria, where applicable:

(1) Still cameras. Still cameras and lenses must be unobtrusive, without distracting light or sound.

(2) Television camera and related equipment. Television cameras are to be electronic and, together with any related equipment to be located in the interview room, must be unobtrusive in both size and appearance, without distracting sound or light. Television cameras are to be designed or modified so that participants in the parole interview being covered are unable to determine when recording is occurring.

(3) Audio equipment. Microphones, wiring and audio recording equipment shall be unobtrusive and shall be of adequate technical quality to prevent interference with the proceeding being covered. Any changes in existing audio systems must be approved by the panel or board. No modifications of existing systems shall be made at public expense.

(4) Advance approval. It shall be the duty of media personnel to demonstrate to the panel or board reasonably in advance of the proceeding that the equipment sought to be utilized meets the criteria set forth in this rule. Failure to obtain advance panel or board approval for equipment may preclude its use in the proceeding. All media equipment and personnel shall be in place at least 15 minutes prior to the scheduled time of commencement of the proceeding.

d. Lighting. Other than light sources already existing in the interview room, no flashbulbs or other artificial light device of any kind shall be employed in the interview room. With the concurrence of the panel and institutional staff, however, modifications may be made in light sources exist-

## PAROLE BOARD[205](cont'd)

ing in the interview room (e.g., higher wattage light bulbs), provided the modifications are installed and maintained without public expense.

e. Equipment and pooling. The following limitations on the amount of equipment and number of photographic and broadcast media personnel in the interview room shall apply:

(1) Still photography. Not more than two still photographers, each using not more than two camera bodies and two lenses, shall be permitted in the interview room during a parole proceeding at any one time.

(2) Television. Not more than two television cameras, each operated by not more than one camera person, shall be permitted in the interview room during a parole proceeding. All components must be contained within the area designated for the camera. Where possible, recording and broadcasting equipment which is not a component part of a television camera shall be located outside of the interview room.

(3) Audio. Not more than one audio system shall be set up in the interview room for broadcast coverage of a parole proceeding. Audio pickup for broadcast coverage shall be accomplished for any existing audio system present in the interview room, if the pickup would be technically suitable for broadcast. Where possible, electronic audio recording equipment and any operating personnel shall be located outside of the interview room.

(4) Pooling. Where the above limitations on equipment and personnel make it necessary, the media shall be required to pool equipment and personnel. Pooling arrangements shall be the sole responsibility of the media and the panel or board shall not be called upon to mediate any dispute as to the appropriate media representatives authorized to cover a particular parole proceeding.

f. Location of equipment and personnel. Equipment and operating personnel shall be located in, and coverage of the proceedings shall take place from, an area or areas within the interview room designated by the panel or institutional staff. The area or areas designated shall provide reasonable access to the proceeding to be covered.

g. Movement during proceedings. Television cameras and audio equipment may be installed in or removed from the interview room only when the panel or board is not in session. In addition, the equipment shall at all times be operated from a fixed position. Still photographers and broadcast media personnel shall not move about the interview room while proceedings are in session, nor shall they engage in any movement which attracts undue attention. Still photographers, shall not assume body positions inappropriate for spectators.

h. Decorum. All still photographers and broadcast media personnel shall be properly attired and shall maintain decorum appropriate for public meeting of a governmental body at all times while covering a parole proceeding.

**205—8.15(906) Parole and work release decisions.**

**8.15(1)** The board shall grant parole to an inmate on work release status if at least three members of the board agree that the inmate can be released without detriment to the community or to the inmate. If three members do not agree, the board shall deny parole.

**8.15(2)** The board shall grant parole or work release to an inmate with a risk assessment score of one, two, three, four, five, or six only if at least three members of the board agree that the inmate can be released without detriment to the community or to the inmate. If three members do not agree, the board shall deny parole or work release.

**8.15(3)** The board shall defer granting parole or work release to an inmate with a risk assessment score of seven or

eight and refer the case to the full board for review. The full board shall grant parole or work release only if at least four members agree that the inmate can be released without detriment to the community or to the inmate. If four members do not agree, the board shall deny parole or work release. If there are not four board members available due to unfilled vacancies on the board, conflicts of interest of board members, illness, or other reason, the board chair may, at the discretion of the chair, suspend the four-vote requirement and allow parole or work release to be granted upon three votes.

**8.15(4)** The board shall defer granting parole or work release to an inmate with a risk assessment score of nine and refer the case to the full board for review. The full board shall grant parole or work release only if the board members unanimously agree that the inmate can be released without detriment to the community or to the inmate. If the board members do not unanimously agree, the board shall deny parole or work release. If any of the five board members are not available due to unfilled vacancies on the board, conflicts of interest of board members, illness, or other reason, the board chair may, at the discretion of the chair, suspend the five-vote requirement and allow parole or work release to be granted upon four votes if one board member is unavailable, or upon three votes if two board members are unavailable.

**8.15(5)** The board may determine if an inmate shall be required to provide a physical specimen to be submitted for DNA profiling as a condition of parole or work release. The board shall consider the deterrent effect of DNA profiling, the likelihood of repeated violations by the offender, and the seriousness of the offense. When funds have been allocated from the general fund of the state, or funds have been provided by other public or private sources, the board shall order DNA profiling if appropriate.

**205—8.16(906) Notice of parole and work release decision.**

**8.16(1)** The board shall give notice of a decision to grant parole by issuing an order for parole to the facility where the inmate in question is incarcerated.

**8.16(2)** The board shall give notice of a decision to grant work release by issuing an order for work release to the facility where the inmate in question is incarcerated.

**8.16(3)** The board shall give notice of a decision to deny parole or work release by issuing a notice of parole or work release denial to the facility where the inmate in question is incarcerated.

**8.16(4)** The board need not disclose a decision to grant or deny parole or work release to anyone other than the inmate in question and the facility where the inmate is incarcerated until at least two working days have elapsed from the date of the decision.

These rules are intended to implement Iowa Code chapter 906 and Iowa Code section 904A.4(8).

## CHAPTER 9

## PAROLE AND WORK RELEASE RESCISSION

Reserved

## CHAPTER 10

## PAROLE AND WORK RELEASE SUPERVISION

**205—10.1(906) Release processing.** Following the issuance of an order for parole or work release by the board, the inmate shall be processed for release pursuant to the rules and procedures of the department of corrections and the district department.

## PAROLE BOARD[205](cont'd)

**205—10.2(906) Parole supervision.** An inmate granted parole or work release shall be under the supervision of the department of corrections, the district department, or a receiving state pursuant to the interstate probation and parole compact. Parole supervision shall continue until the expiration of the maximum sentence, subject to early discharge by the board or the district department.

**205—10.3(906) Parole or work release agreement.** A parole or work release agreement containing standard and special conditions of parole or work release shall be prepared without unreasonable delay following the board's issuance of the order for parole or work release. The parole or work release shall not commence until the inmate has signed the agreement. If the inmate is on work release status at the time parole is granted, the inmate shall remain on work release status until the parole agreement is signed. The inmate shall remain at the residential facility until the parole agreement is signed.

These rules are intended to implement Iowa Code chapter 906.

### CHAPTER 11 PAROLE REVOCATION

**205—11.1(906) Voluntary termination of parole.** Any voluntary termination of parole should be executed in writing by the parolee and approved by the parole officer. Upon the execution of the voluntary termination of parole, the parolee's parole is terminated and the parolee shall be returned to the Iowa Medical and Classification Center at Oakdale as soon as reasonably possible.

The parole officer shall determine if the parolee shall be incarcerated prior to the parolee's return to the Iowa Medical and Classification Center and shall make arrangements accordingly. The parolee shall receive credit for the time spent on parole prior to the voluntary termination of parole.

**205—11.2(906) Prerevocation procedures.** Reserved.

**205—11.3(908) Revocation initiated.** Parole revocation procedures shall be initiated only as provided by Iowa Code chapter 908, which this rule is intended to implement.

**205—11.4(908) Revocation of parole.** The board of parole or its administrative parole judge for good cause shown may revoke any parole previously granted. Good cause for revocation of parole shall include the violation of a condition or conditions of the parole agreement, or parole plan. Parole revocation procedures, including the parole revocation hearing, are governed by Iowa Code chapter 17A.

**205—11.5(908) Parole violations.**

**11.5(1)** The parole officer shall report to the board any parolee who is reasonably believed to have engaged in the following kinds of behavior:

- a. Violation of any federal or state laws, except simple misdemeanors.
- b. Any violent or assaultive conduct.
- c. Possession, control or use of any firearms, imitation firearms, explosives or weapons as defined in federal or state statutes.
- d. Sale, possession, continual or problem use, transportation or distribution of any narcotic or other controlled substance or excessive use of alcohol by the parolee.
- e. A parolee whose whereabouts are unknown and has been unavailable for contact for 30 days, or reliable information has been received indicating that the parolee is taking flight or absconding.

f. Any behavior indicating the parolee may be suffering from a mental disorder which impairs the parolee's ability to maintain the parolee in the community or which makes the parolee a danger to the parolee or others when the mental disorder cannot be adequately treated while in the community.

g. Any other conduct or pattern of conduct in violation of the conditions of parole deemed sufficiently serious by the parole officer.

**11.5(2)** The parole officer or supervisor is authorized to dispose of any other parolee misconduct not required to be reported above.

**205—11.6(908) Parole violation report.** The parole violation report is a document prepared by the parole officer on a form or media provided by the board specifying the parole violation charges against a parolee and containing or referring to information known to the parole agent relevant to the charges.

**11.6(1)** Supplemental parole violation report. A supplemental parole violation report may be submitted to report sufficient new information or evidence which proves or disproves violations previously charged; note court action on charges which are being prosecuted in a criminal proceeding or expand, clarify, or correct information in an earlier report; provide the board with information not related to the violation but which may affect the board's decision regarding the appropriate disposition; and provide additional requested information to the board at any time or change the officer's recommendation. A supplemental report shall be filed upon the apprehension of a parolee on absconder status.

**11.6(2)** Recommendations. The parole officer shall recommend the appropriate disposition necessary to deal with the alleged violation. In a parole violation report the parole agent may make the following recommendations:

a. Continue on parole. This recommendation may be used when a violation charge is not serious enough to warrant reincarceration. A copy of the violation report containing a "continue on parole" recommendation shall be personally delivered and explained to the parolee, by the parole officer, and the parolee shall be given an opportunity to admit the alleged violations. Admitted violations contained in the report may be used to adjust time calculations in a later revocation proceeding. In the event that a dispute arises as to alleged violations, the parolee may request a parole hearing. The senior administrative parole judge shall review the violation report and enter an order either affirming the recommendation to continue on parole or scheduling the matter for a parole revocation hearing before another administrative parole judge.

A parolee shall be allowed only two violation reports containing a "continue on parole" recommendation in a 12-month period; then a parole revocation hearing must be scheduled.

Generally, violations occurring over 12 months prior to the request for a parole revocation hearing will not be used to adjust time calculations, except in absconder cases and related matters.

b. Schedule for revocation proceedings. This recommendation may be used whenever the violation(s) alleged is so serious that reincarceration may be necessary.

c. Delay action. This recommendation is used when there is a lack of information at the time the report is submitted or because charges are still pending and final disposition is unknown, or the whereabouts of the parolee are unknown. The parole officer shall notify the board of the reason(s) for the recommendation to delay action.

## PAROLE BOARD[205](cont'd)

d. Issue a detainer. This recommendation is used to request that an Iowa detainer be placed against an Iowa parolee who is serving time in another jurisdiction for an offense committed while on parole which would constitute a felony or aggravated misdemeanor if committed in Iowa.

e. Continue on parole and impose special condition 209A of the parole agreement, participation in the violator's program. This recommendation may be used when there have been violation of parole, but treatment at the violator's program is seen as a reasonable alternative to revocation of parole.

f. Automatic revocation. This recommendation may be used when a parolee has been convicted and sentenced to a new felony.

**11.6(3) District review.**

a. Parole officer's responsibility. After discovery of information indicating a possible violation of parole, and determination by the parole officer that the violation(s) must be reported to the board, the parole officer shall prepare a parole violation report.

b. Parole supervisor review. After the preparation of a parole violation report, the supervisor shall review the report. If the supervisor concurs with the recommendation made, the supervisor shall submit the report to the business office of the parole board for review and scheduling of a parole revocation hearing, if required.

**205—11.7(908) Parole revocation hearing.** Following receipt of a parole officer's request for a parole revocation hearing, the administrative parole judge or board designated officer shall set the date, time and place of the parole revocation hearing and shall cause a notice of parole revocation hearing to be completed. The parole revocation hearing shall be held in any county in the same judicial district as that in which the alleged parole violator had the initial appearance, or in the county from which the warrant for the arrest of the alleged parole violator was issued.

**11.7(1) Parole revocation hearing notice.** The parole officer or the board's designated officer shall cause to be prepared a written notice to the parolee of the date, time, and place of the parole revocation hearing which shall:

a. Include a complete copy of the report of violations including all documents referred to therein except confidential material defined in subrule 6.4(2).

b. Be served upon the parolee by personal service. The notice may be served by any person 18 years or older at least seven days prior to the parole revocation hearing unless the parolee waives the right to seven days' advance notice.

c. Inform the parolee of the purpose of the hearing; the violations of parole conditions alleged; the circumstances of the alleged violations; the possible action which may be taken as a result of the revocation proceedings; and the following rights to which the parolee shall be entitled at the parole revocation hearing. The right to:

(1) Appear and speak in their own behalf and to be aided by an interpreter if aid is determined to be necessary by the administrative parole judge.

(2) Representation by an attorney or, if the parolee is indigent, the right to representation by an attorney pursuant to rule 26 of the Iowa Rules of Criminal Procedure.

(3) Remain silent.

(4) Present witnesses to testify in the parolee's behalf as to matters relevant to the alleged violation of parole.

(5) Confront and cross-examine adverse witnesses unless the administrative parole judge determines that such witnesses would be subjected to risk of harm.

(6) Present documentary evidence and any relevant material or information.

**11.7(2) Testimony at parole revocation hearing.** All testimony shall be under oath.

**11.7(3) Parole revocation hearing recorded.** Parole revocation hearings shall be mechanically recorded. The recording or transcription thereof shall be filed and maintained by the board of parole for at least five years from the date of the parole revocation hearing.

**11.7(4) Witnesses segregated.** The administrative parole judge on the judge's own motion or on the request of the parolee, parolee's counsel, or any representative of the state may order witnesses to be sequestered except that the parole officer, parolee, and counsel may be present at all times at the hearing.

**11.7(5) Parole revocation hearing evidence.** The admissibility of evidence at parole revocation proceedings is governed by Iowa Code section 17A.14.

a. Documentary evidence. The parole officer shall ensure all relevant documentary evidence is available at the hearing and has been made available to the parolee and the parolee's attorney prior to the hearing unless designated confidential. This evidence includes the violation report and statements of witnesses. When relevant documentary evidence is not available, the parole officer shall specify what evidence is unavailable and why.

b. Physical evidence. Physical evidence is ordinarily not required at the hearing. The parole officer may bring physical evidence to the hearing if the parolee has requested it or it appears necessary for the hearing, security is not endangered and there is no other means of presenting the information.

**11.7(6) Witnesses.**

a. Parolee request. A parolee may request either friendly or adverse witnesses. If a witness is requested by the parolee or the parolee's attorney, the parolee or the parolee's attorney shall notify the parole officer.

b. Parole officer request. If, in preparing the case prior to the hearing, the parole officer requires a particular witness to demonstrate essential facts of violation, attendance of that witness may be requested by the officer even though the parolee has not requested that witness. If a witness is requested by the parole officer, the officer shall notify the parolee or the parolee's attorney.

c. Witnesses' transportation. All witnesses shall provide their own transportation.

d. Fearful witnesses. All witnesses who refuse to attend the hearing either because they would be subjected to risk of harm if their identities were disclosed or who, even if their identities were known, fear for their safety should they attend the hearing shall be interviewed by the parole officer prior to the hearing, their information documented in writing or on tape, the reasons for their fear should also be documented, and the administrative parole judge shall determine whether good cause exists to excuse the witness's attendance and shall document the decision including the reasons.

e. Interviewing witnesses. A parolee or the parolee's attorney has the right to speak to possible witnesses, but it is completely within the discretion of an individual witness whether to speak to or disclose the witness's whereabouts to a parolee or the parolee's attorney. No attempt should be made by the parole board staff to influence the witness's decision.

## PAROLE BOARD[205](cont'd)

**11.7(7) Subpoenas—general.** Subpoenas may be issued to require the attendance of witnesses or the production of documents at parole revocation hearings.

a. Who may request. The parolee, the parolee's attorney, parole officer, and board staff may request that a subpoena be issued.

b. To whom made. Requests shall be made directly to the administrative parole judge or the board designated officer as appropriate.

c. When made. The request shall be made prior to the scheduled hearing.

d. Subpoena duces tecum. The request for a subpoena duces tecum shall be accompanied by a declaration in support of the request. The declaration must show good cause for production of documentary evidence and specify precisely the documentary evidence to be produced, the relevance and materiality of that evidence to the hearing, and that the requested witness has possession or control of the documentary evidence.

e. The board of parole shall not be required to pay subpoena service fees, witness fees, or witness transportation expenses.

**11.7(8) Continuances.**

a. A hearing may be continued by the presiding administrative parole judge for good cause shown, either upon the presiding judge's own motion or upon the request of a party. A party's request for continuance shall be made in writing prior to the hearing to the board business office. Each party shall be granted only one continuance except that in the case of extreme emergency, determined by the presiding administrative parole judge, further continuance may be granted.

b. If, because of an emergency or other good cause, a party having received timely notice is unable to attend the hearing or request continuance within the allotted time, the presiding administrative parole judge may continue the hearing and schedule another hearing with notice to all interested parties.

c. A notice of continuance may be served upon the parolee's attorney of record for the parole revocation proceeding, in lieu of personal service upon the parolee.

d. If a notice of continuance does not involve any new allegations of parole violation, it need not be served upon the parolee or the parolee's attorney of record at least seven days prior to the hearing date. However, if the notice of continuance includes allegations of violations beyond those contained in the original notice of hearing, it must be served upon the parolee or the parolee's attorney of record at least seven days prior to the hearing date.

**11.7(9) Areas of responsibility.** The following areas of responsibility will apply for parole revocation hearing.

a. The parole officer will be responsible for the following:

(1) Coordinating and scheduling location, security, and control of the parole revocation hearing in a courtroom unless good cause is established prior to the hearing;

(2) Preparing notice of hearing forms and causing the notices to be served;

(3) Notifying parolee's attorney of record of hearing date, time, and place;

(4) Notifying all necessary state witnesses of the hearing date, time, and place;

(5) Processing any required subpoenas on behalf of the state;

(6) Ensuring all relevant state documents, forms, and materials are available at the hearing;

(7) Attending the hearing;

(8) Arranging security for posthearing transfer of the parolee in the event incarceration is ordered.

b. The administrative parole judge shall be responsible for the following:

(1) Maintaining records on all hearings in the field;

(2) Advising the business office regarding progress of each case;

(3) Forwarding to the business office all materials and forms when hearings are completed.

**11.7(10) Parole revocation hearing—adjudication.**

a. At the conclusion of the adjudication stage of the hearing, the administrative parole judge shall determine whether the parolee has violated the conditions of parole and shall verbally advise the parolee of the decision.

b. If the administrative parole judge determines that the parolee has not violated the conditions of parole, the judge shall order that the parolee be released from custody and continued on parole.

c. If the administrative parole judge finds that the parolee has violated a condition or conditions of parole, the judge shall make one of the following dispositions at the parole revocation hearing:

(1) Revocation of the parole;

(2) Revocation of the parole with the parolee placed on work release;

(3) Reinstatement of the parole with the previous parole conditions;

(4) Reinstatement of the parole with a modification of the parole conditions;

(5) Continuation of the dispositional portion of the hearing.

d. The administrative parole judge shall determine from the record established at the final revocation hearing the date(s) of violation of parole. The judge shall also determine the number of days of parole which shall not be counted toward the discharge of the parolee's sentence. This number shall not exceed the number of days after the date of first violation during which the parolee was not incarcerated.

**11.7(11) Parole revocation—order.** The administrative parole judge or the board's designated officer, shall forward an order to the parolee, parolee's attorney, the parole officer, and the board office as soon as reasonably possible following the parole revocation hearing. The order shall contain the judge's findings of fact, conclusions of law and disposition of the matter.

**11.7(12) Parole revocation hearing—conduct of the media.** The rules governing the conduct of the media at parole interviews as set out in rule 8.14(4) shall also apply to parole revocation hearings, except that decisions committed to the discretion of the board or board panel in that rule shall be made by the presiding administrative parole judge.

**205—11.8(908) Appeal or review.** The order of the administrative parole judge shall become the final decision of the board of parole unless, within ten days of the date of the decision, the parole violator appeals the decision or a panel of the board reviews the decision on its own motion. On appeal or review of the judge's decision, the board panel has all the power which it would have in initially making the revocation hearing decision. The appeal or review shall be conducted pursuant to rules adopted by the board of parole. The record on appeal or review shall be the record made at the parole revocation hearing conducted by the administrative parole judge. Appeals must be received at the parole office or be postmarked by the applicable date or they will not be considered.

## PAROLE BOARD[205](cont'd)

**205—11.9(908) Interstate compact probable cause hearings.** The Iowa board of parole may conduct interstate compact parole probable cause hearings under the same procedures as the Iowa parole revocation hearings.

**11.9(1)** Interstate compact probable cause hearings. The Iowa board of parole, or an administrative parole judge, may conduct a probable cause hearing for a parolee from another state who is on parole in Iowa under the terms of the interstate compact on parole and probation according to the same procedures which govern parole revocation hearings for Iowa parolees who are on parole in Iowa.

**11.9(2)** Interstate compact parole revocation hearings. If an Iowa parolee was on parole outside the state of Iowa through the interstate compact on probation and parole and has been returned to Iowa following a finding of probable cause in the receiving state, a parole revocation hearing shall be conducted for the parolee at the Iowa institution at which the parolee is incarcerated. This hearing shall be conducted according to the same procedures as those specified for hearings conducted for Iowa parolees who are on parole in the state of Iowa.

**205—11.10(908) Parolee convicted of new offenses.** A parolee who is found guilty of a new offense or who pleads guilty to a new offense, including simple misdemeanors, has no right to the adjudication stage of the parole revocation hearing with regard to the new offense.

**205—11.11(908) Waivers.** When the parole officer makes a recommendation to the board of parole for revocation of parole, the parole officer shall inform the parolee of the parolee's rights and afford the parolee the opportunity to execute a waiver of parole revocation hearing.

The parole officer should also inform the parolee of the opportunity to waive the parolee's right to personal appearance and consent to the parole revocation hearing being conducted over the telephone.

**11.11(1)** Waiver of parole revocation hearing. A waiver of parole revocation hearing shall constitute an admission of the alleged violation(s) and shall include a waiver of any right to a personal appearance before the administrative parole judge to contest the violations.

**11.11(2)** Parole revocation hearing waiver procedures. If the parolee desires to execute a waiver of parole revocation hearing, the waiver shall be entered on the appropriate form provided by the board which shall be signed by the parolee in the presence of the administrative parole judge or the parole officer/supervisor if conducted electronically. The administrative parole judge shall make a verbatim record of the waiver proceeding and shall address the parolee personally and inform the parolee of and determine that the parolee understands the contents of the waiver form which shall include:

- a. The nature of the parole violation that is addressed;
- b. The legal rights of the parolee;
- c. The fact that the execution of the waiver constitutes an admission of the alleged violation(s);
- d. The fact that the parolee may be committed to the custody of the Iowa department of corrections without further proceedings.

(1) A waiver is complete and final upon execution.

(2) A waiver may be appealed according to the parole board's parole revocation appeal process in rule 205—11.8(908).

**11.11(3)** Waiver of the right to personal appearance. In the event the parolee executes a waiver of the right to person-

al appearance and consent to parole revocation hearing to be conducted over the telephone, the parole revocation hearing should be scheduled and conducted as a routine parole revocation hearing with the exception that it shall be conducted electronically.

**205—11.12(908) Conviction while on parole.** When a parolee is convicted and sentenced to incarceration in Iowa for a felony committed while on parole, or is convicted and sentenced to incarceration under the laws of any other state of the United States or a foreign government or country for an offense committed while on parole, and which if committed in Iowa would be a felony, or the parolee is convicted of an aggravated misdemeanor and sentenced to a state correctional institution, the parolee's parole shall be deemed revoked as of the date of the commission of the offense.

**11.12(1)** The parole officer shall inform the sentencing judge that the convicted defendant is a parole violator. The term for which the defendant shall be imprisoned as a parole violator shall be the same as that provided in cases of revocation of parole for violation of the conditions of parole. The new sentence of imprisonment for conviction of a felony shall be served consecutively to the sentence for which the defendant was on parole, unless a concurrent term of imprisonment is ordered by the court.

**11.12(2)** The parole officer shall forward to the board of parole a violation report together with a file-stamped copy of the judgment entry and sentencing order for the offense committed during the parole. An administrative parole judge shall review the violation report and the judgment entry and sentencing order, and, if satisfied that the conditions of Iowa Code section 908.10 and of this rule have been met, shall issue an order revoking the parole. The judge shall also determine the date of commission of the felony offense and the date of subsequent incarceration in a state institution. Time loss shall be the time between these two dates, except that the parolee shall receive credit for any time the parolee was incarcerated in a county jail between these two dates.

**11.12(3)** The parolee shall be notified in writing that the parole has been revoked on the basis of the new conviction, and a copy of the commitment order shall accompany the notification. The parolee's record shall be reviewed pursuant to the provision of Iowa Code section 906.5, or as soon as practical after a final reversal of the new conviction.

**11.12(4)** An inmate may appeal the revocation of parole under this rule according to the procedure indicated in rule 205—11.8(908).

**11.12(5)** Neither the administrative parole judge nor the board shall retry the facts underlying any conviction.

These rules are intended to implement Iowa Code chapters 906 and 908.

## CHAPTER 12 PROBATION REVOCATION

**205—12.1(906) Voluntary termination of probation.** Any voluntary termination of probation should be executed in writing by the probationer and approved by the probation officer. Upon the execution of the voluntary termination of probation, the probationer's probation is terminated and the probationer shall be committed to the Iowa Medical and Classification Center at Oakdale as soon as reasonably possible. The probation officer shall determine if the probationer shall be incarcerated prior to the probationer's commitment to the Iowa Medical and Classification Center and shall make arrangements accordingly.

## PAROLE BOARD[205](cont'd)

**205—12.2(906) Prerevocation procedures.** Reserved.

**205—12.3(908) Revocation initiated.** Probation revocation procedures shall be initiated only as provided by Iowa Code chapter 908, which this rule is intended to implement.

**205—12.4(908) Revocation of probation.** The board of parole's parole and probation judges for good cause shown may revoke any probation previously granted. Good cause for revocation of probation shall include the violation of a condition or conditions of the probation agreement, or probation plan.

**205—12.5(908) Probation violations.**

**12.5(1)** The probation officer shall report to the board any probationer who is reasonably believed to have engaged in the following kinds of behavior:

- a. Violation of any federal or state laws, except simple misdemeanors.
- b. Any violent or assaultive conduct.
- c. Possession, control or use of any firearms, imitation firearms, explosives or weapons as defined in federal or state statutes.
- d. Sale, possession, continual or problem use, transportation or distribution of any narcotic or other controlled substance or excessive use of alcohol by the probationer.
- e. A probationer whose whereabouts are unknown and who has been unavailable for contact for 30 days, or reliable information has been received indicating that the probationer is taking flight or absconding.
- f. Any behavior indicating the probationer may be suffering from a mental disorder which impairs the probationer's ability to maintain the probation in the community or which makes the probationer a danger to the probationer or others when the mental disorder cannot be adequately treated while in the community.
- g. Any other conduct or pattern of conduct in violation of the conditions of probation deemed sufficiently serious by the probation officer.

**12.5(2)** The probation officer or supervisor is authorized to dispose of any other probationer misconduct not required to be reported above.

**205—12.6(908) Probation violation report.** The probation violation report is a document prepared by the probation officer on a form or media provided by the board specifying the probation violation charges against a probationer and containing or referring to information known to the probation officer relevant to the charges.

**12.6(1)** Supplemental probation violation report. A supplemental probation violation report may be submitted to report sufficient new information or evidence which proves or disproves violations previously charged; note court action on charges which are being prosecuted in a criminal proceeding or expand, clarify, or correct information in an earlier report; provide the board with information not related to the violation but which may affect the board's decision regarding the appropriate disposition; and provide additional requested information to the board at any time or change the officer's recommendation. A supplemental report shall be filed upon the apprehension of a probationer on absconder status.

**12.6(2)** Recommendations. The probation officer shall recommend the appropriate disposition necessary to deal with the alleged violation. In a probation violation report, the probation agent may make the following recommendations:

- a. Continue on probation. This recommendation may be used when a violation charge is not serious enough to war-

rant incarceration. A copy of the violation report containing a "continue on probation" recommendation shall be personally delivered and explained to the probationer, by the probation officer, and the probationer shall be given an opportunity to admit the alleged violations. Admitted violations contained in the report may be used to adjust time calculations in a later revocation proceeding. In the event that a dispute arises as to alleged violations, the probationer may request a probation hearing. The senior administrative parole and probation judge shall review the violation report and enter an order either affirming the recommendation to continue on probation or schedule the matter for the probation revocation hearing before another administrative parole and probation judge.

A probationer shall be allowed only two violation reports containing a "continue on probation" recommendation in a 12-month period; then a probation revocation hearing must be scheduled.

Generally, violations occurring over 12 months prior to the request for a probation revocation hearing will not be used to adjust time calculations, except in absconder cases and related matters.

b. Schedule for revocation proceedings. This recommendation may be used whenever the violation(s) alleged is so serious that incarceration is necessary.

c. Delay action. This recommendation is used when there is a lack of information at the time the report is submitted or because charges are still pending and final disposition is unknown, or the whereabouts of the probationer are unknown. The probation officer shall notify the board of the reason(s) for the recommendation to delay action.

d. Issue a detainer. This recommendation is used to request that an Iowa detainer be placed against an Iowa probationer who is serving time in another jurisdiction for an offense committed while on probation which would constitute a felony or aggravated misdemeanor if committed in Iowa.

e. Continue on probation and impose special condition 209A of the parole agreement, participation in the violator's program. This recommendation may be used when there have been violations of probation, but treatment at the violator's program is seen as a reasonable alternative to revocation of probation.

**12.6(3)** District review.

a. Probation officer's responsibility. After discovery of information indicating a possible violation of probation, and determination by the probation officer that the violation(s) must be reported to the board, the probation officer shall prepare a probation violation report.

b. Probation supervisor review. After the preparation of a probation violation report the supervisor shall review the report, shall concur with the recommendation made, and shall submit the report to the business office of the parole board for review and scheduling of a probation revocation hearing, if required.

**12.6(4)** Procedure in lieu of arrest. A probation officer may issue a summons/citation for a probation violation hearing. If a summons/citation is issued, the probation officer shall indicate the date, time, and place of the probation hearing on the summons/citation. The probation officer shall contact the board of parole as soon as possible upon the issuance of a summons/citation. The probation revocation hearing conducted pursuant to a summons/citation shall be conducted according to Chapter 12 of the board of parole's administrative rules.

**205—12.7(908) Probation revocation hearing.** Following receipt of a probation officer's request for a probation revoca-

## PAROLE BOARD[205](cont'd)

tion hearing, the administrative parole and probation judge or the board's designated officer shall set the date, time and place of the probation revocation hearing and shall cause a notice of probation revocation hearing to be completed. The probation revocation hearing shall be held in the county of probationer's residence; in the county where alleged probation violations occurred; in the same judicial district as that in which the alleged probation violator had the initial appearance, or in the county from which the warrant for the arrest of the alleged probation violator was issued.

**12.7(1) Probation revocation hearing notice.** The probation officer or board's designated officer shall cause to be prepared a written notice to the probationer of the date, time, and place of the probation revocation hearing which shall:

a. Include a complete copy of the report of violations including all documents referred to therein except confidential material defined in subrule 6.4(2).

b. Be served upon the probationer by personal service. The notice may be served by any person 18 years or older at least seven days prior to the probation revocation hearing unless the probationer waives the right to seven days' advance notice.

c. Inform the probationer of the purpose of the hearing; the violations of probation condition(s) alleged; the circumstances of the alleged violations; the possible action which may be taken as a result of the revocation proceedings; and the following rights to which the probationer shall be entitled at the probation revocation hearing. The right to:

(1) Appear and speak in their own behalf and to be aided by an interpreter if aid is determined to be necessary by the administrative parole and probation judge.

(2) Representation by an attorney or, if the probationer is indigent, the right to representation by an attorney pursuant to rule 26 of the Iowa Rules of Criminal Procedure.

(3) Remain silent.

(4) Present witnesses to testify in the probationer's behalf as to matters relevant to the alleged violation of probation.

(5) Confront and cross-examine adverse witnesses unless the administrative parole and probation judge determines that such witnesses would be subjected to risk of harm.

(6) Present documentary evidence and any relevant material or information.

**12.7(2) Testimony at probation revocation hearing.** All testimony shall be under oath.

**12.7(3) Probation revocation hearing recorded.** Probation revocation hearings shall be mechanically recorded. The recording or transcription thereof shall be filed and maintained by the board of parole for at least five years from the date of the probation revocation hearing. The probation revocation hearing may be video taped if deemed appropriate by parole and probation judges.

**12.7(4) Witnesses segregated.** The administrative parole and probation judge on the judge's own motion or on the request of the probationer, probationer's counsel, or any representative of the state may order witnesses be segregated except that the probation officer, probationer, and counsel may be present at all times at the hearing.

**12.7(5) Probation revocation hearing evidence.** The admissibility of evidence at probation revocation proceedings is governed by Iowa Code section 17A.14.

a. Documentary evidence. The probation officer shall ensure all relevant documentary evidence is available at the hearing and has been made available to the probationer and the probationer's attorney prior to the hearing unless designated confidential. This evidence includes the violation report and statements of witnesses. When relevant documen-

tary evidence is not available, the probation officer shall specify what evidence is unavailable and why.

b. Physical evidence. Physical evidence is ordinarily not required at the hearing. The probation officer may bring physical evidence to the hearing if the probationer has requested it or it appears necessary for the hearing, security is not endangered and there are no other means of presenting the information.

**12.7(6) Witnesses.**

a. Probationer request. A probationer may request either friendly or adverse witnesses. If a witness is requested by the probationer or the probationer's attorney, the probationer or the probationer's attorney shall notify the probation officer.

b. Probation officer request. If, in preparing the case prior to the hearing, the probation officer requires a particular witness to demonstrate essential facts of violation, attendance of that witness may be requested by the officer even though the probationer has not requested that witness. If a witness is requested by the probation officer, the officer shall notify the probationer or the probationer's attorney.

c. Witnesses' transportation. All witnesses shall provide their own transportation.

d. Fearful witnesses. All witnesses who refuse to attend the hearing either because they would be subjected to risk of harm if their identities were disclosed or who even if their identities were known, fear for their safety, should they attend the hearing, shall be interviewed by the probation officer prior to the hearing, their information documented in writing or on tape, the reasons for their fear should also be documented, and the administrative parole and probation judge shall determine whether good cause exists to excuse the witness's attendance and shall document the decision including the reasons.

e. Interviewing witnesses. A probationer or the probationer's attorney has the right to speak to possible witnesses, but it is completely within the discretion of an individual witness whether to speak to or disclose the witness's whereabouts to a probationer or the probationer's attorney. No attempt should be made by the parole board staff to influence the witness's decision.

**12.7(7) Subpoenas—general.** Subpoenas may be issued to require the attendance of witnesses or the production of documents at probation revocation hearings.

a. Who may request. The probationer, the probationer's attorney, probation officer, and board staff may request that a subpoena be issued.

b. To whom made. Requests shall be made directly to the administrative parole and probation judge or the board's designated officer as appropriate.

c. When made. The request shall be made prior to the scheduled hearing.

d. Subpoena deuces tecum. The request for a subpoena deuces tecum shall be accompanied by a declaration in support of the request. The declaration must show good cause for production of documentary evidence and specify precisely the documentary evidence to be produced, the relevance and materiality of that evidence to the hearing, and that the requested witness has possession or control of the documentary evidence.

e. The board of parole shall not be required to pay subpoena service fees, witness fees, or witness transportation expenses.

**12.7(8) Continuances.**

a. A hearing may be continued by the presiding administrative parole and probation judge for good cause shown, ei-

## PAROLE BOARD[205](cont'd)

ther upon the presiding judge's own motion or upon the request of a party. A party's request for continuance shall be made in writing prior to the hearing, to the board business office. Each party shall be granted only one continuance except that in the case of extreme emergency, determined by the presiding administrative parole and probation judge, further continuance may be granted.

b. If, because of an emergency or other good cause, a party having received timely notice is unable to attend the hearing or request continuance within the allotted time, the presiding administrative parole and probation judge may continue the hearing and schedule another hearing with notice to all interested parties.

c. A notice of continuance may be served upon the probationer's attorney of record for the probation revocation proceeding in lieu of personal service upon the probationer.

d. If a notice of continuance does not involve any new allegations of probation violation, it need not be served upon the probationer or the probationer's attorney of record at least seven days prior to the hearing date. However, if the notice of continuance includes allegations of violations beyond those contained in the original notice of hearing, it must be served upon the probationer or the probationer's attorney of record at least seven days prior to the hearing date.

**12.7(9) Areas of responsibility.** The following areas of responsibility will apply for probation revocation hearings.

a. The probation officer will be responsible for the following:

(1) Coordinating and scheduling location, security, and control of the probation revocation hearing in a courtroom unless good cause is established prior to the hearing;

(2) Preparing notice of hearing forms and causing the notices to be served;

(3) Serving a written notice of probation revocation hearing on the county attorney or the county attorney's designee at least five days prior to the hearing date;

(4) Notifying probationer's attorney of record of hearing date, time, and place;

(5) Notifying all necessary state witnesses of the hearing date, time, and place;

(6) Processing any required subpoenas on behalf of the state;

(7) Ensuring all relevant state documents, forms, and materials are available at the hearing;

(8) Attending the hearing;

(9) Arranging security for posthearing transfer of the probationer in the event incarceration is ordered;

(10) Forwarding a summary of probation hearing to the county attorney, or the county attorney's designee as soon as reasonably possible following the probation revocation hearing.

b. The administrative parole and probation judge shall be responsible for the following:

(1) Maintaining records on all hearings in the fields;

(2) Advising the business office regarding progress of each case;

(3) Forwarding to the business office all materials and forms when hearings are completed.

**12.7(10) Probation revocation hearing—adjudication.**

a. At the conclusion of the adjudication stage of the hearing, the administrative parole and probation judge shall determine whether the probationer has violated the conditions of probation and shall verbally advise the probationer of the decision.

b. If the administrative parole and probation judge determines that the probationer has not violated the conditions

of probation, the judge shall order that the probationer be released from custody and continued on probation.

c. If the administrative parole and probation judge finds that the probationer has violated a condition or conditions of probation, the judge shall make one of the following dispositions at the probation revocation hearing or any disposition allowed by the Code of Iowa section 908.11:

(1) Revocation of the probation.

(2) Revocation of the probation with the probationer placed on work release.

(3) Reinstatement of the probation with the previous probation conditions.

(4) Reinstatement of the probation with a modification of the probation conditions.

(5) Continuation of the dispositional portion of the hearing.

d. The administrative parole and probation judge shall determine from the record established at the final revocation hearing the date(s) of violation of probation. The judge shall also determine the number of days of probation which shall not be counted toward the discharge of the probationer's sentence.

**12.7(11) Probation revocation—hearing summary.** The administrative parole and probation judge or the board's designated officer, shall forward a summary of probation revocation hearing to the probationer, probationer's attorney, the probation officer, and the board office as soon as reasonably possible following the probation revocation hearing. The summary of the probation revocation shall consist of a summary of the proceeding and shall contain the judge's findings of fact, conclusions of law and disposition of the matter.

**12.7(12) Probation revocation hearing—conduct of the media.** The rules governing the conduct of the media at parole interviews as set out in subrule 8.14(4) shall also apply to probation revocation hearings, except that decisions committed to the discretion of the board or board panel in that rule shall be made by the presiding administrative parole and probation judge.

**205—12.8(908) Appeal or review.** The order of the administrative parole and probation judge shall become the final decision of the board of parole unless within ten days of the date of the decision, the probation violator appeals the decision or a panel of the board reviews the decision on its own motion. On appeal or review of the judge's decision, the board panel has all the power which it would have in initially making the revocation hearing decision. The appeal or review shall be conducted pursuant to rules adopted by the board of parole. The record on appeal or review shall be the record made at the probation revocation hearing conducted by the administrative parole and probation judge. Appeals must be received at the parole office or be postmarked by the applicable date or they will not be considered.

**205—12.9(908) Interstate compact probable cause hearings.** The Iowa board of parole may conduct interstate compact probation probable cause hearings under the same procedures as the Iowa probation revocation hearings.

**12.9(1) Interstate compact probable cause hearings.** The Iowa board of parole, or an administrative parole and probation judge, may conduct a probable cause hearing for a probationer from another state who is on probation in Iowa, under the terms of the interstate compact, according to the same procedures which govern probation revocation hearings for Iowa probationers who are on probation in Iowa.

**12.9(2) Interstate compact probation revocation hearings.** If an Iowa probationer was on probation outside the state of

## PAROLE BOARD[205](cont'd)

Iowa through the interstate compact, and has been returned to Iowa following a finding of probable cause in the receiving state, a probation revocation hearing shall be conducted for the probationer at the Iowa institution at which the probationer is incarcerated. This hearing shall be conducted according to the same procedures as those specified for hearings conducted for Iowa probationers who are on probation in the state of Iowa.

**205—12.10** Reserved.

**205—12.11(908) Waivers.** When the probation officer makes a recommendation to the board of parole for revocation of probation, the probation officer shall inform the probationer of the probationer's rights and afford the probationer the opportunity to execute a waiver of probation revocation hearing.

The probation officer should also inform the probationer of the opportunity to waive the probationer's right to personal appearance and consent to the probation revocation hearing being conducted over the telephone.

**12.11(1)** Waiver of probation revocation hearing. A waiver of probation revocation hearing shall constitute an admission of the alleged violation(s) and shall include a waiver of any right to a personal appearance before the administrative parole and probation judge to contest the violations.

**12.11(2)** Probation revocation hearing waiver procedures. If the probationer desires to execute a waiver of probation revocation hearing, the waiver shall be entered on the appropriate form provided by the board which shall be signed by the probationer in the presence of the administrative parole and probation judge or the probation officer/supervisor if conducted electronically. The administrative parole and probation judge shall make a verbatim record of the waiver proceeding and shall address the probationer personally and inform the probationer of and determine that the probationer understands the contents of the waiver form which shall include:

- a. The nature of the probation violation to which the waiver is addressed;
- b. The legal rights of the probationer;
- c. The fact that the execution of the waiver constitutes an admission of the alleged violation(s);
- d. The fact that the probationer may be committed to the custody of the Iowa department of corrections without further proceedings.

(1) A waiver is complete and final upon execution.

(2) A waiver may be appealed according to the parole board's probation revocation appeal process in rule 205—12.8(908).

**12.11(3)** Waiver of the right to personal appearance. In the event the probationer executes a waiver of the right to personal appearance and consent to probation revocation hearing to be conducted over the telephone, the probation revocation hearing should be scheduled and conducted as a routine probation revocation hearing with the exception that it shall be conducted electronically.

**205—12.12(908) Conviction of a felony while on probation.** Reserved.

**205—12.13(908) Conviction of an aggravated misdemeanor while on probation.** Reserved.

**205—12.14(908) Electronic means.** The administrative parole and probation judges may use facsimile machines, telephones, two-way interactive video or other electronic means to conduct any or all of the probation revocation proceedings

and probation revocation hearings. An electronically produced document shall have the same force and effect as an original document.

These rules are intended to implement Iowa Code chapters 906 and 908.

### CHAPTER 13 PAROLE DISCHARGE

**205—13.1(906) Discharge from parole supervision.**

**13.1(1)** Statutory discharge. The board shall discharge a parolee from parole supervision when the parolee expires the term of the parolee's sentence.

**13.1(2)** Early discharge. The board or the supervising district department may discharge a parolee from parole supervision prior to the expiration of the term of the parolee's sentence when the board or district department determines that the parolee is able and willing to fulfill the obligations of a law-abiding citizen without further supervision.

**205—13.2(906) Persons not eligible.** A parolee convicted of a violation of Iowa Code section 709.3, 709.4, or 709.8 committed on or with a child shall not be discharged from parole until the parolee expires the term of the parolee's sentence.

These rules are intended to implement Iowa Code section 906.15.

### CHAPTER 14 EXECUTIVE CLEMENCY

**205—14.1(902) Interviews of inmates serving life terms.**

The board shall not grant a parole or work release to a Class "A" felon serving a life term unless the governor commutes the sentence to a term of years. Administrative rules relating to the parole and work release consideration of an inmate sentenced to an indeterminate term shall not apply to an inmate sentenced to a life term. The board may interview a Class "A" felon serving a life term to determine whether to recommend that the governor commute the sentence to a term of years. The board shall recommend that the governor commute the sentence when the board concludes that the inmate should be considered for release on parole or work release. In making such a recommendation, the board shall also indicate the existence of any registered victims, and communicate any opinions expressed by those victims regarding release of the inmate.

**205—14.2(902) Review of inmates serving life terms.** The board may review the record of a Class "A" felon serving a life term at its discretion.

**205—14.3(248A) Executive clemency applications.**

**14.3(1)** Applications to the board.

a. A person convicted of a criminal offense may apply to the board for a recommendation to the governor for a reprieve, pardon, commutation of sentence, or remission of fines and forfeitures at any time following the person's conviction.

b. An application for a pardon or commutation of sentence shall be on the form provided by the board. The form may be obtained by contacting the board business office.

c. An application for a reprieve or remission of fines and forfeitures shall be in writing.

d. The applicant shall submit the executive clemency application to the board business office.

**14.3(2)** Applications to the governor. Upon the request of the governor, the board shall take charge of all correspondence in reference to an executive clemency application

## PAROLE BOARD[205](cont'd)

filed with the governor and shall provide the governor with the board's advice and recommendation.

**14.3(3) Restoration of citizenship.**

a. A person convicted of a criminal offense may apply for a restoration of citizenship at any time following the discharge of the person's sentence.

b. A person applying for restoration of citizenship within 60 days of discharge of the person's sentence shall submit the short form Application for Restoration of Citizenship, together with an original of a progress report from the supervising agent, to the board. This form may be obtained from the supervising officer. The board shall submit a recommendation to the governor regarding restoration of citizenship.

c. A person applying for restoration of citizenship more than 60 days after discharge of the person's sentence shall submit the Executive Clemency Application form to the governor. This form may be obtained from the governor's office or from the board. The governor shall obtain a recommendation regarding restoration of citizenship from the board.

**205—14.4(248A,902) Board investigation.** The board may investigate an application or district department recommendation with respect to history, current situation, parole prospects and other pertinent matters. The board may consider the application or recommendation, transcripts of judicial proceedings and all documents submitted with the application, and other documents as the board determines is appropriate and may interview public officials, victims, and witnesses, and other individuals as the board determines is appropriate.

**205—14.5(248A,902) Executive clemency recommendations.****14.5(1) Decision.**

a. The board shall recommend that the governor grant commutation of sentence to a Class "A" felon serving a life term when the board unanimously agrees that the inmate should be considered for release on parole. If the board does not unanimously agree, the board shall recommend that the governor not grant commutation of sentence.

b. The board shall recommend that the governor grant executive clemency to a person other than a Class "A" felon serving a life term when at least three members of the board agree that the person has demonstrated that the person will become or continue to be a law-abiding citizen. If three members of the board do not agree, the board shall recommend that the governor not grant executive clemency.

**14.5(2) Notice of board recommendation.** The board shall give notice of an executive clemency recommendation to the office of the governor and if requested, to the inmate or applicant.

**14.5(3) Board consideration following commutation.** The board shall consider the parole and work release prospects of an inmate whose sentence has been commuted by the governor.

**14.5(4) Executive clemency reconsiderations.**

a. The board may reconsider at any time a board recommendation to grant executive clemency that the governor has denied and returned to the board. The procedures for reviewing an executive clemency application shall apply to the reconsideration of a denied recommendation.

b. The board may refile the recommendation with the governor or withdraw the recommendation.

These rules are intended to implement Iowa Code sections 902.2, 902.4, 904A.4(7) and chapter 914.

CHAPTER 15  
APPEAL OF DECISIONS

**205—15.1(17A) General.** An inmate, parolee, 6th District probationer or work releasee may appeal any action of the board staff or board that affects that person except a decision to schedule a hearing or a work release transfer hearing decision, the denial of an appeal, or the decision to conduct an appearance by electronic means or the revocation of parole which shall be appealed according to the procedure indicated in rule 205—11.8(908).

**205—15.2(17A) Grounds.** The general grounds for an appeal include that the board action is:

1. In violation of constitutional or statutory provisions;
2. In excess of the statutory authority of the board;
3. In violation of a board rule;
4. Made upon unlawful procedure;
5. Affected by other error of law;
6. Unsupported by evidence or based on incorrect or incomplete information which, if correct or complete, might have resulted in a different action;
7. Unreasonable, arbitrary, or capricious or characterized by an abuse of discretion or a clearly unwarranted exercise of decision.

**205—15.3(17A) Filing an appeal.**

**15.3(1)** An appeal shall be filed in writing and shall state:

- a. The nature of the board action which is the subject of the appeal.
- b. The particular agency action appealed from.
- c. The grounds on which relief is sought.
- d. The relief sought.

**15.3(2)** All grounds shall be included in the same appeal, and all necessary documents and information shall be attached to the appeal.

**15.3(3)** The appeal shall be submitted to the business office. An appeal must be received at the parole board office, or be postmarked, within ten days of the receipt of notice of the action appealed. The board is not required to consider untimely appeals.

**205—15.4(17A) Board review and decision.** The board of parole, a designee of the board or a panel of three or more members of the board shall review the appeal. The chairperson or the designee, or the panel may affirm, modify or reverse the action being appealed, or may defer for further consideration, including granting the inmate, parolee, or work releasee an appearance before the board. The board shall give notice to the inmate, parolee, or work releasee of its decision.

**205—15.5(17A) Other appearances before the board.** An inmate, parolee, or work releasee may request an appearance before the board by submitting a written request to the business office or a board liaison officer. A member of the board may grant the request for an appearance.

**205—15.6(21) Electronic appearances.** The board may require an inmate, parolee, or work releasee who has been granted an appearance before the board to appear by electronic means.

These rules are intended to implement Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202.

**ARC 8834A****PROFESSIONAL LICENSURE  
DIVISION[645]****Notice of Intended Action**

Twenty-five interested persons, a governmental subdivision, an agency or association of 25 or more persons may demand an oral presentation hereon as provided in Iowa Code section 17A.4(1)"b."

Notice is also given to the public that the Administrative Rules Review Committee may, on its own motion or on written request by any individual or group, review this proposed action under section 17A.8(6) at a regular or special meeting where the public or interested persons may be heard.

Pursuant to the authority of Iowa Code section 147.53, the Professional Licensure Division of the Public Health Department hereby gives Notice of Intended Action to adopt Chapter 6, "Petitions for Rule Making," Chapter 7, "Agency Procedure for Rule Making," Chapter 8, "Declaratory Orders," Chapter 9, "Complaints and Investigations," Chapter 11, "Contested Cases," Chapter 12, "Informal Settlement," Chapter 13, "Discipline," Chapter 14, "Child Support Non-compliance," Chapter 15, "Noncompliance of Loan Repayment," Chapter 16, "Impaired Practitioner Review Committee," and Chapter 17, "Materials for Board Review," Iowa Administrative Code.

These chapters are being adopted by the division to save duplication in each individual board's administrative rules.

These proposed amendments implement Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202, that become effective July 1, 1999. They establish rules for non-compliance on child support payments, noncompliance on student loan repayments, and impaired practitioner review committee. Deadlines for materials to be submitted for board review at regularly scheduled meetings are established.

Any interested person may make written comments on the proposed amendments not later than April 14, 1999, addressed to Marge Bledsoe, Professional Licensure, Department of Public Health, Lucas State Office Building, Des Moines, Iowa 50319-0075.

There will be a public hearing on April 15, 1999, from 9 to 11 a.m. in the Professional Licensure Conference Room, Lucas State Office Building, Fifth Floor, Des Moines, Iowa 50319-0075. Persons may present their views at the public hearing either orally or in writing. At the hearing, persons will be asked to give their names and addresses for the record and to confine their remarks to the subject of the amendments.

The division has determined that the amendments will have no impact on small business within the meaning of Iowa Code section 17A.31.

The proposed amendments are intended to implement Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202, and Iowa Code chapters 21, 22, 147, 252J, 261, and 272C.

The following amendments are proposed.

ITEM 1. Adopt a **new 645—Chapter 6**, "Petitions for Rule Making," as follows:

**CHAPTER 6  
PETITIONS FOR RULE MAKING**

The division of professional licensure hereby adopts the petitions for rule making segment of the Uniform Rules on Agency Procedure which are printed in the first volume of

the Iowa Administrative Code, with the following amendments:

**645—6.1(17A) Petition for rule making.** In lieu of the words "(Designate office)", insert the name of the specific board in professional licensure. A request for access to a record should be addressed to the Professional Licensure Division, Lucas State Office Building, Des Moines, Iowa 50319-0075.

In lieu of the words "(AGENCY NAME)", the heading of the petition should read:

BEFORE THE BOARD OF EXAMINERS FOR THE LICENSING AND  
REGULATION OF (INSERT SPECIFIC BOARD NAME FOR A  
BOARD LISTED IN THE PROFESSIONAL LICENSURE DIVISION)

**645—6.2(17A) Inquiries.** Inquiries concerning the status of a petition for rule making may be made to the (name of the specific board) in Professional Licensure Division, Lucas State Office Building, Des Moines, Iowa 50319-0075.

These rules are intended to implement Iowa Code section 17A.7 as amended by 1998 Iowa Acts, chapter 1202.

ITEM 2. Adopt a **new 645—Chapter 7**, "Agency Procedure for Rule Making," as follows:

**CHAPTER 7  
AGENCY PROCEDURE FOR RULE MAKING**

**645—7.1(17A) Adoption by reference.** The professional licensure division hereby adopts the agency procedure for rule making segment of the Uniform Rules on Agency Procedure which are printed in the first volume of the Iowa Administrative Code, with the following amendments:

1. In lieu of the words "(commission, board, council, director)", insert "board".

2. In lieu of the words "(specify time period)", insert "one year".

3. In lieu of the words "(identify office and address)", insert "Administrator, Professional Licensure Division, Public Health Department, Lucas State Office Building, Des Moines, Iowa 50319".

4. In lieu of the words "(designate office and telephone number)", insert "the administrator at (515)424-6385".

5. In lieu of the words "(designate office)", insert "Professional Licensure Division, Public Health Department, Lucas State Office Building, Des Moines, Iowa 50319".

6. In lieu of the words "(specify the office and address)", insert "Professional Licensure Division, Public Health Department, Lucas State Office Building, Des Moines, Iowa 50319".

7. In lieu of the words "(agency head)", insert "administrator".

These rules are intended to implement Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202.

ITEM 3. Adopt a **new 645—Chapter 8**, "Declaratory Orders," as follows:

**CHAPTER 8  
DECLARATORY ORDERS**

The division of professional licensure hereby adopts the declaratory orders segment of the Uniform Rules on Agency Procedure which are printed in the first volume of the Iowa Administrative Code, with the following amendments:

**645—8.1(17A) Petition for declaratory order.** In lieu of the words "(Designate office)", insert "(name of specific licensing board in the professional licensure division), Profes-

## PROFESSIONAL LICENSURE DIVISION[645](cont'd)

sional Licensure, Department of Public Health, Fifth Floor, Lucas State Office Building, Des Moines, Iowa 50319-0075".

In lieu of the words "(AGENCY NAME)", the heading on the petition should read:

BEFORE THE (insert the name of the specific board in the professional licensure division)

**645—8.2(17A) Notice of petition.** In lieu of the words "\_\_\_ days (15 or less)", insert "15 days".

**645—8.3(17A) Intervention.**

8.3(1) In lieu of the words "\_\_\_ days", insert "15 days".

**645—8.5(17A) Inquiries.** In lieu of the words "(designate official by full title and address)", insert "(name of the specific board in the professional licensure division), Professional Licensure, Fifth Floor, Lucas State Office Building, Des Moines, Iowa 50319-0075".

These rules are intended to implement Iowa Code section 17A.9 as amended by 1998 Iowa Acts, chapter 1202.

ITEM 4. Adopt a new 645—Chapter 9, "Complaints and Investigations," as follows:

## CHAPTER 9

## COMPLAINTS AND INVESTIGATIONS

**645—9.1(272C) Complaints.**

9.1(1) A complaint shall be made in writing and shall be mailed or delivered to the Board of \_\_\_\_\_ Examiners, Professional Licensure Division, Department of Public Health, Lucas State Office Building, Des Moines, Iowa 50319-0075. The complaint shall include the name and address of the complainant, the name of the licensee, and a concise statement of the allegations against the licensee. A complaint may also be initiated upon the board's own motion pursuant to evidence received by the board. Timely filing of complaints is required in order to ensure the availability of witnesses and to avoid initiation of an investigation under conditions which may have been significantly altered during the period of delay.

9.1(2) A person shall not be civilly liable as a result of filing a complaint with the board, or for the disclosure to the board or its agents or employees, whether or not pursuant to a subpoena of records, documents, testimony or other forms of information which constitute privileged matter concerning a recipient of health care services or some other person, in connection with the duties of the board. However, such immunity from civil liability shall not apply if such act is done with malice.

**645—9.2(272C) Report of malpractice claims or actions or disciplinary actions.** Each licensee shall submit a copy of any judgment or settlement in a malpractice claim or any disciplinary action taken by another licensing authority in another state or jurisdiction to the board within 30 days of the date of occurrence.

**645—9.3(272C) Report of acts or omissions.** Each licensee having first-hand knowledge of acts or omissions of the board's statute or administrative rules shall report to the board those acts or omissions when committed by another person licensed to practice by the board. The report shall include the name and address of the licensee and the date, time, and place of the incident.

**645—9.4(272C) Investigation of complaints or reports.** The chairperson of the board may assign an investigation of a complaint or report to a member of the board or may request

an investigator from the department of inspections and appeals to investigate the complaint or report. The investigating board member or the investigator may request information from any peer review committee which may be established to assist the board. The investigating board member or investigator may consult an assistant attorney general concerning the investigation or evidence produced from the investigation. A board member who has personally investigated a complaint is disqualified from participating in any contested case proceeding resulting from the investigation.

**645—9.5(17A,272C) Issuance of investigatory subpoenas.**

9.5(1) The board administrator or designee may, upon the written request of a board investigator or on the administrator's own initiative, subpoena books, papers, records, and other real evidence which is necessary for the board to decide whether to institute a contested case proceeding. In the case of a subpoena for mental health records, each of the following conditions shall be satisfied prior to the issuance of the subpoena:

- a. The nature of the complaint reasonably justifies the issuance of a subpoena;
- b. Adequate safeguards have been established to prevent unauthorized disclosure;
- c. An express statutory mandate, articulated public policy, or other recognizable public interest favors access; and
- d. An attempt was made to notify the patient and to secure an authorization from the patient for release of the records at issue.

9.5(2) A written request for a subpoena or the administrator's written memorandum in support of the issuance of a subpoena shall contain the following:

- a. The name and address of the person to whom the subpoena will be directed;
- b. A specific description of the books, papers, records or other real evidence requested;
- c. An explanation of why the documents sought to be subpoenaed are necessary for the board to determine whether it should institute a contested case proceeding; and
- d. In the case of a subpoena request for mental health records, confirmation that the conditions described in 9.5(1) have been satisfied.

9.5(3) Each subpoena shall contain:

- a. The name and address of the person to whom the subpoena is directed;
- b. A description of the books, papers, records or other real evidence requested;
- c. The date, time and location for production, or inspection and copying;
- d. The time within which a motion to quash or modify the subpoena must be filed;
- e. The signature, address and telephone number of the board administrator or designee;
- f. The date of issuance;
- g. A return of service.

9.5(4) Any person who is aggrieved or adversely affected by compliance with the subpoena and who desires to challenge the subpoena must, within 14 days after service of the subpoena, or before the time specified for compliance if such time is less than 14 days, file with the board a motion to quash or modify the subpoena. The motion shall describe the legal reasons why the subpoena should be quashed or modified, and may be accompanied by legal briefs or factual affidavits.

## PROFESSIONAL LICENSURE DIVISION[645](cont'd)

**9.5(5)** Upon receipt of a timely motion to quash or modify a subpoena, the board may request an administrative law judge to issue a decision, or the board may issue a decision. Oral argument may be scheduled at the discretion of the board or the administrative law judge. The administrative law judge or the board may quash or modify the subpoena, deny the motion, or issue an appropriate protective order.

**9.5(6)** A person aggrieved by a ruling of an administrative law judge who desires to challenge that ruling must appeal the ruling to the board by serving on the board administrator, either in person or by certified mail, a notice of appeal within ten days after service of the decision of the administrative law judge.

**9.5(7)** If the person contesting the subpoena is not the person under investigation, the board's decision is final for purposes of judicial review. If the person contesting the subpoena is the person under investigation, the board's decision is not final for purposes of judicial review until either (1) the person is notified the investigation has been concluded with no formal action, or (2) there is a final decision in the contested case.

**645—9.6(272C) Peer review committees.**

**9.6(1)** A complaint may be assigned to a peer review committee for review, investigation, or report to the board.

**9.6(2)** The board shall determine which peer review committee will review a case and what complaints or other matters shall be referred to a peer review committee for investigation, review, or report to the board.

**9.6(3)** Members of the peer review committees shall not be liable for acts, omissions, or decisions made in connection with service on the peer review committee. However, such immunity from civil liability shall not apply if such act is done with malice.

**9.6(4)** The peer review committees shall observe the requirements of confidentiality imposed by Iowa Code section 272C.6.

**645—9.7(17A) Appearance.** The board may request that a licensee appear before a committee of the board to discuss a pending investigation. By electing to participate in the committee appearance, the licensee waives any objection to a board member both participating in the appearance and later participating as a decision maker in a contested case proceeding. By electing to participate in the committee appearance, the licensee further waives any objection to the board administrator assisting the board in the contested case proceeding.

These rules are intended to implement Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202, and Iowa Code chapter 272C.

ITEM 5. Adopt a **new 645—Chapter 11**, "Contested Cases," as follows:

CHAPTER 11  
CONTESTED CASES

**645—11.1(17A) Scope and applicability.** This chapter applies to contested case proceedings conducted by the board of \_\_\_\_\_ examiners.

**645—11.2(17A) Definitions.** Except where otherwise specifically defined by law:

"Contested case" means a proceeding defined by Iowa Code section 17A.2(5) and includes any matter defined as a no factual dispute contested case under 1998 Iowa Acts, chapter 1202, section 14.

"Issuance" means the date of mailing of a decision or order or date of delivery if service is by other means unless another date is specified in the order.

"Party" means the state or the respondent.

"Presiding officer" means the board of \_\_\_\_\_ examiners.

**645—11.3(17A) Time requirements.**

**11.3(1)** Time shall be computed as provided in Iowa Code subsection 4.1(34).

**11.3(2)** For good cause, the presiding officer may extend or shorten the time to take any action, except as precluded by statute or by rule. Except for good cause stated in the record, before extending or shortening the time to take any action, the presiding officer shall afford all parties an opportunity to be heard or to file written arguments.

**645—11.4(17A) Probable cause.** In the event the board finds there is probable cause for taking disciplinary action against a licensee following investigation, the board shall order a contested case hearing be commenced by the filing of a statement of charges and notice of hearing.

**645—11.5(17A) Legal review.** Every statement of charges and notice of hearing prepared by the board shall be reviewed by the office of the attorney general prior to filing.

**645—11.6(17A) Statement of charges and notice of hearing.**

**11.6(1) Delivery.** Delivery of the statement of charges and notice of hearing constitutes the commencement of the contested case proceeding. Delivery may be executed by:

- a. Personal service as provided in the Iowa Rules of Civil Procedure; or
- b. Restricted certified mail, return receipt requested; or
- c. Publication, as provided in the Iowa Rules of Civil Procedure.

**11.6(2) Contents.** The statement of charges and notice of hearing shall contain the following information:

- a. A statement of the time, place, and nature of the hearing;
- b. A statement of the legal authority and jurisdiction under which the hearing is to be held;
- c. A reference to the particular sections of the statutes and rules involved;
- d. A short and plain statement of the matters asserted. This statement shall contain sufficient detail to give the respondent fair notice of the allegations so that the respondent may adequately respond to the charges, and to give the public notice of the matters at issue;
- e. Identification of all parties including the name, address and telephone number of the assistant attorney general designated as prosecutor for the state and the parties' counsel, if known;
- f. Reference to the procedural rules governing conduct of the contested case proceeding;
- g. Reference to the procedural rules governing informal settlement;
- h. Identification of the board as the presiding officer; and
- i. Notification of the time period in which a party may request, when applicable, and pursuant to 1998 Iowa Acts, chapter 1202, section 15(1), and rules 11.8(17A,272C) and 11.9(17A,272C), that the presiding officer be an administrative law judge.

**645—11.7(17A,272C) Legal representation.** Following the filing of the statement of charges and notice of hearing, the office of the attorney general shall be responsible for the

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legal representation of the public interest in all proceedings before the board.

**645—11.8(17A,272C) Presiding officer in a disciplinary contested case.** The presiding officer in a disciplinary contested case shall be the board. However, the board may request that an administrative law judge assist the board with initial rulings on prehearing matters. Decisions of the administrative law judge serving in this capacity are subject to the interlocutory appeal provisions of rule 11.24(17A). In addition, an administrative law judge may assist and advise the board at the contested case hearing.

**645—11.9(17A) Presiding officer in a nondisciplinary contested case.**

**11.9(1)** Any party in a nondisciplinary contested case who wishes to request that the presiding officer assigned to render a proposed decision be an administrative law judge employed by the department of inspections and appeals must file a written request within 20 days after service of a notice of hearing which identifies or describes the presiding officer as the board.

**11.9(2)** The board may deny the request only upon a finding that one or more of the following apply:

a. There is a compelling need to expedite issuance of a final decision in order to protect the public health, safety, or welfare.

b. An administrative law judge with the qualifications identified in 11.9(4) is unavailable to hear the case within a reasonable time.

c. The case involves significant policy issues of first impression that are inextricably intertwined with the factual issues presented.

d. The demeanor of the witnesses is likely to be dispositive in resolving the disputed factual issues.

e. Funds are unavailable to pay the costs of an administrative law judge and an interagency appeal.

f. The request was not timely filed.

g. The request is not consistent with a specified statute.

**11.9(3)** The board shall issue a written ruling specifying the grounds for its decision within 20 days after a request for an administrative law judge is filed. If the ruling is contingent upon the availability of an administrative law judge with the qualifications identified in 11.9(4), the parties shall be notified at least ten days prior to hearing if a qualified administrative law judge will not be available.

**11.9(4)** An administrative law judge assigned to act as presiding officer in a nondisciplinary contested case shall have a J.D. degree unless waived by the agency.

**11.9(5)** Except as provided otherwise by another provision of law, all rulings by an administrative law judge acting as presiding officer in a nondisciplinary contested case are subject to appeal to the board. A party must seek appeal to the board in order to exhaust adequate administrative remedies. Such appeals must be filed within ten days of the date of the issuance of the challenged ruling, but no later than the time for compliance with the order or the date of hearing, whichever is first.

**11.9(6)** Unless otherwise provided by law, when reviewing a proposed decision of an administrative law judge in a nondisciplinary contested case upon appeal, the board shall have the powers of and shall comply with the provisions of this chapter which apply to presiding officers.

**645—11.10(17A) Disqualification.**

**11.10(1)** A presiding officer or other person shall withdraw from participation in the making of any proposed or final decision in a contested case if that person:

a. Has a personal bias or prejudice concerning a party or a representative of a party;

b. Has personally investigated, prosecuted or advocated, in connection with that case, the specific controversy underlying that case, another pending factually related contested case, or a pending factually related controversy that may culminate in a contested case involving the same parties;

c. Is subject to the authority, direction or discretion of any person who has personally investigated, prosecuted or advocated in connection with that contested case, the specific controversy underlying that contested case, or a pending factually related contested case or controversy involving the same parties;

d. Has acted as counsel to any person who is a private party to that proceeding within the past two years;

e. Has a personal financial interest in the outcome of the case or any other significant personal interest that could be substantially affected by the outcome of the case;

f. Has a spouse or relative within the third degree of relationship that: (1) is a party to the case, or an officer, director or trustee of a party; (2) is a lawyer in the case; (3) is known to have an interest that could be substantially affected by the outcome of the case; or (4) is likely to be a material witness in the case; or

g. Has any other legally sufficient cause to withdraw from participation in the decision making in that case.

**11.10(2)** The term "personally investigated" means taking affirmative steps to interview witnesses directly or to obtain documents or other information directly. The term "personally investigated" does not include general direction and supervision of assigned investigators, unsolicited receipt of information which is relayed to assigned investigators, review of another person's investigative work product in the course of determining whether there is probable cause to initiate a proceeding, or exposure to factual information while performing other agency functions, including fact gathering for purposes other than investigation of the matter which culminates in a contested case. Factual information relevant to the merits of a contested case received by a person who later serves as presiding officer in that case shall be disclosed if required by 1998 Iowa Acts, chapter 1202, section 19(3), and subrules 11.10(3) and 11.22(9).

**11.10(3)** In a situation where a presiding officer or other person knows of information which might reasonably be deemed to be a basis for disqualification and decides voluntary withdrawal is unnecessary, that person shall submit the relevant information for the record by affidavit and shall provide for the record a statement of the reasons for the determination that withdrawal is unnecessary.

**11.10(4)** If a party asserts disqualification on any appropriate ground, including those listed in subrule 11.10(1), the party shall file a motion supported by an affidavit pursuant to 1998 Iowa Acts, chapter 1202, section 19(7). The motion must be filed as soon as practicable after the reason alleged in the motion becomes known to the party. The board shall determine the matter as part of the record in the case.

**645—11.11(17A) Consolidation—severance.**

**11.11(1)** Consolidation. The presiding officer may consolidate any or all matters at issue in two or more contested case proceedings where the matters at issue involve common parties or common questions of fact or law; consolidation would expedite and simplify consideration of the issues involved; and consolidation would not adversely affect the rights of any of the parties to those proceedings.

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**11.11(2) Severance.** The presiding officer may, for good cause shown, order any contested case proceedings or portions thereof severed.

**645—11.12(17A) Answer.**

**11.12(1)** An answer shall be filed within 20 days of service of the statement of charges and notice of hearing.

**11.12(2)** An answer shall show on whose behalf it is filed and specifically admit, deny, or otherwise answer all material allegations of the statement of charges. It shall state any facts deemed to show an affirmative defense and contain as many additional defenses as the respondent may claim.

**11.12(3)** An answer shall state the name, address and telephone number of the person filing the answer, the person or entity on whose behalf it is filed, and the attorney representing that person, if any.

**11.12(4)** Any allegation in the statement of charges not denied in the answer is considered admitted. The presiding officer may refuse to consider any defense not raised in the answer which could have been raised on the basis of facts known when the answer was filed if any party would be prejudiced.

**11.12(5)** Amendments to the statement of charges and to an answer may be allowed with the consent of the parties or in the discretion of the presiding officer who may impose terms or grant a continuance.

**645—11.13(17A) Service and filing.**

**11.13(1) Service—when required.** Every document filed in a contested case proceeding shall be served upon each of the parties of record to the proceeding, including the assistant attorney general designated as prosecutor for the state, simultaneously with their filing. Except for the original notice of hearing and an application for rehearing as provided in Iowa Code section 17A.16(2), the party filing a document is responsible for service on all parties.

**11.13(2) Service—how made.** Service upon a party represented by an attorney shall be made upon the attorney unless otherwise ordered. Service is made by delivery or by mailing a copy to the person's last-known address. Service by mail is complete upon mailing, except where otherwise specifically provided by statute, rule, or order.

**11.13(3) Filing—when required.** After the notice of hearing, all documents in a contested case proceeding shall be filed with the board. All documents that are required to be served upon a party shall be filed simultaneously with the board.

**11.13(4) Filing—when made.** Except where otherwise provided by law, a document is deemed filed at the time it is delivered to the Board of \_\_\_\_\_ Examiners, Board Administrator, Lucas State Office Building, Des Moines, Iowa 50319, or delivered to an established courier service for immediate delivery to that office, or mailed by first-class mail or state interoffice mail to that office, so long as there is proof of mailing.

**11.13(5) Proof of mailing.** Proof of mailing includes a legible United States Postal Service postmark on the envelope, a certificate of service, or a notarized affidavit.

**645—11.14(17A) Discovery.**

**11.14(1)** Discovery procedures applicable in civil actions are applicable in contested cases. Unless lengthened or shortened by these rules or by order of the presiding officer, time periods for compliance with discovery shall be as provided in the Iowa Rules of Civil Procedure.

**11.14(2)** Any motion relating to discovery shall allege that the moving party has previously made a good-faith attempt to resolve the discovery issues involved with the op-

posing party. Motions in regard to discovery shall be ruled upon by the presiding officer. Opposing parties shall be afforded the opportunity to respond within ten days of the filing of the motion unless the time is shortened. The presiding officer may rule on the basis of the written motion and any response, or may order argument on the motion.

**645—11.15(17A,272C) Issuance of subpoenas in a contested case.**

**11.15(1)** Subpoenas issued in a contested case may compel the attendance of witnesses at depositions or hearing, and may compel the production of books, papers, records, and other real evidence. A command to produce evidence or to permit inspection may be joined with a command to appear at deposition or hearing, or may be issued separately. Subpoenas shall be issued by the board administrator or designee upon written request. A request for a subpoena of mental health records must confirm the conditions described in subrule 9.5(1) prior to the issuance of the subpoena.

**11.15(2)** A request for a subpoena shall include the following information, as applicable, unless the subpoena is requested to compel testimony or documents for rebuttal or impeachment purposes:

- a. The name, address and telephone number of the person requesting the subpoena;
- b. The name and address of the person to whom the subpoena shall be directed;
- c. The date, time, and location at which the person shall be commanded to attend and give testimony;
- d. Whether the testimony is requested in connection with a deposition or hearing;
- e. A description of the books, papers, records or other real evidence requested;
- f. The date, time and location for production, or inspection and copying; and
- g. In the case of a subpoena request for mental health records, confirmation that the conditions described in subrule 9.5(1) have been satisfied.

**11.15(3)** Each subpoena shall contain, as applicable:

- a. The caption of the case;
- b. The name, address and telephone number of the person who requested the subpoena;
- c. The name and address of the person to whom the subpoena is directed;
- d. The date, time, and location at which the person is commanded to appear;
- e. Whether the testimony is commanded in connection with a deposition or hearing;
- f. A description of the books, papers, records or other real evidence the person is commanded to produce;
- g. The date, time and location for production, or inspection and copying;
- h. The time within which a motion to quash or modify the subpoena must be filed;
- i. The signature, address and telephone number of the board administrator or designee;
- j. The date of issuance;
- k. A return of service.

**11.15(4)** Unless a subpoena is requested to compel testimony or documents for rebuttal or impeachment purposes, the board administrator or designee shall mail copies of all subpoenas to the parties to the contested case. The person who requested the subpoena is responsible for serving the subpoena upon the subject of the subpoena.

**11.15(5)** Any person who is aggrieved or adversely affected by compliance with the subpoena, or any party to the contested case who desires to challenge the subpoena must,

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within 14 days after service of the subpoena, or before the time specified for compliance if such time is less than 14 days, file with the board a motion to quash or modify the subpoena. The motion shall describe the legal reasons why the subpoena should be quashed or modified, and may be accompanied by legal briefs or factual affidavits.

**11.15(6)** Upon receipt of a timely motion to quash or modify a subpoena, the board may request an administrative law judge to issue a decision, or the board may issue a decision. Oral argument may be scheduled at the discretion of the board or the administrative law judge. The administrative law judge or the board may quash or modify the subpoena, deny the motion, or issue an appropriate protective order.

**11.15(7)** A person aggrieved by a ruling of an administrative law judge who desires to challenge that ruling must appeal the ruling to the board by serving on the board administrator, either in person or by certified mail, a notice of appeal within ten days after service of the decision of the administrative law judge.

**11.15(8)** If the person contesting the subpoena is not the person under investigation, the board's decision is final for purposes of judicial review. If the person contesting the subpoena is the person under investigation, the board's decision is not final for purposes of judicial review until there is a final decision in the contested case.

**645—11.16(17A) Motions.**

**11.16(1)** No technical form for motions is required. However, prehearing motions must be in writing, state the grounds for relief, and state the relief sought.

**11.16(2)** Any party may file a written response to a motion within ten days after the motion is served, unless the time period is extended or shortened by the presiding officer. The presiding officer may consider a failure to respond within the required time period in ruling on a motion.

**11.16(3)** The presiding officer may schedule oral argument on any motion.

**11.16(4)** Motions pertaining to the hearing must be filed and served at least ten days prior to the date of hearing unless there is good cause for permitting later action or the time for such action is lengthened or shortened by rule of the agency or an order of the presiding officer.

**645—11.17(17A) Prehearing conferences.**

**11.17(1)** Any party may request a prehearing conference. Prehearing conferences shall be conducted by the board administrator, who may request the assistance of an administrative law judge. A written request for prehearing conference or an order for prehearing conference on the board administrator's own motion shall be filed prior to the contested case hearing, but no later than 20 days prior to the hearing date. Written notice of the prehearing conference shall be given by the board administrator to all parties. For good cause the board administrator may permit variances from this rule.

**11.17(2)** The parties at a prehearing conference shall be prepared to discuss the following subjects, and the board administrator or administrative law judge may issue appropriate orders concerning:

- a. The possibility of settlement.
- b. The entry of a scheduling order to include deadlines for completion of discovery.
- c. Stipulations of law or fact.
- d. Stipulations on the admissibility of exhibits.
- e. Submission of expert and other witness lists. Witness lists may be amended subsequent to the prehearing conference within the time limits established by the board administrator or administrative law judge at the prehearing conference.

ence. Any such amendments must be served on all parties. Witnesses not listed on the final witness list may be excluded from testifying unless there was good cause for the failure to include their names.

f. Submission of exhibit lists. Exhibit lists may be amended subsequent to the prehearing conference within the time limits established by the board administrator or administrative law judge at the prehearing conference. Exhibits other than rebuttal exhibits that are not listed on the final exhibit list may be excluded from admission into evidence unless there was good cause for the failure to include them.

g. Stipulations for waiver of any provision of law.

h. Identification of matters which the parties intend to request be officially noticed.

i. Consideration of any additional matters which will expedite the hearing.

**11.17(3)** Prehearing conferences may be conducted by telephone unless otherwise ordered.

**645—11.18(17A) Continuances.**

**11.18(1)** Applications for continuances shall be filed with the board. In the event the application for continuance is not contested, the board administrator shall issue the appropriate order. In the event the application for continuance is contested, the matter shall be heard by the board or may be delegated by the board to an administrative law judge.

**11.18(2)** A written application for a continuance shall:

a. Be made at the earliest possible time and no less than five working days before the hearing. Within five working days of the date set for hearing, no continuances shall be granted except for extraordinary, extenuating, or emergency circumstances;

b. State the specific reasons for the request; and

c. Be signed by the requesting party or the party's representative.

**11.18(3)** In determining whether to grant a continuance, the presiding officer may consider:

a. Prior continuances;

b. The interests of all parties;

c. The public interest;

d. The likelihood of informal settlement;

e. The existence of an emergency;

f. Any objection;

g. Any applicable time requirements;

h. The existence of a conflict in the schedules of counsel, parties, or witnesses;

i. The timeliness of the request; and

j. Other relevant factors.

**11.18(4)** The presiding officer may require documentation of any grounds for continuance.

**645—11.19(17A,272C) Hearing procedures.**

**11.19(1)** The presiding officer shall have the authority to administer oaths, to admit or exclude testimony or other evidence, and to rule on all motions and objections. The presiding officer may request that an administrative law judge perform any of these functions and may be assisted and advised by an administrative law judge.

**11.19(2)** All objections shall be timely made and stated on the record.

**11.19(3)** Parties have the right to participate or to be represented in all hearings or prehearing conferences related to their case. Any party may be represented by an attorney at their own expense.

**11.19(4)** Subject to terms and conditions prescribed by the presiding officer, parties have the right to introduce evidence on issues of material fact, cross-examine witnesses

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present at the hearing as necessary for a full and true disclosure of the facts, present evidence in rebuttal, and submit briefs and engage in oral argument.

**11.19(5)** The presiding officer shall maintain the decorum of the hearing and may refuse to admit or may expel anyone whose conduct is disorderly.

**11.19(6)** Witnesses may be sequestered during the hearing.

**11.19(7)** The presiding officer shall have authority to grant immunity from disciplinary action to a witness as provided by Iowa Code section 272C.6(3).

**11.19(8)** The presiding officer shall conduct the hearing in the following manner:

a. The presiding officer shall give an opening statement briefly describing the nature of the proceedings;

b. The parties shall be given an opportunity to present opening statements;

c. The parties shall present their cases in the sequence determined by the presiding officer;

d. Each witness shall be sworn or affirmed by the presiding officer or the court reporter, and be subject to examination and cross-examination. The presiding officer may limit questioning in a manner consistent with law;

e. When all parties and witnesses have been heard, the parties may be given the opportunity to present final arguments.

**11.19(9)** The board members and the administrative law judge have the right to question a witness. Examination of witnesses is subject to properly raised objections.

**11.19(10)** The hearing shall be open to the public unless the licensee requests that the hearing be closed.

**645—11.20(17A) Evidence.**

**11.20(1)** The presiding officer shall rule on admissibility of evidence and may, where appropriate, take official notice of facts in accordance with all applicable requirements of law.

**11.20(2)** Stipulation of facts is encouraged. The presiding officer may make a decision based on stipulated facts.

**11.20(3)** Evidence in the proceeding shall be confined to the issues as to which the parties received notice prior to the hearing unless the parties waive their right to such notice or the presiding officer determines that good cause justifies expansion of the issues. If the presiding officer decides to admit evidence on issues outside the scope of the notice over the objection of a party who did not have actual notice of those issues, that party, upon timely request, shall receive a continuance sufficient to amend pleadings and to prepare on the additional issue.

**11.20(4)** The party seeking admission of an exhibit must provide opposing parties with an opportunity to examine the exhibit prior to the ruling on its admissibility. Copies of documents should normally be provided to opposing parties. All exhibits admitted into evidence shall be appropriately marked and be made part of the record.

**11.20(5)** Any party may object to specific evidence or may request limits on the scope of any examination or cross-examination. Such an objection shall be accompanied by a brief statement of the grounds upon which it is based. The objection, the ruling on the objection, and the reasons for the ruling shall be noted in the record.

**11.20(6)** Whenever evidence is ruled inadmissible, the party offering that evidence may submit an offer of proof on the record. The party making the offer of proof for excluded oral testimony shall briefly summarize the testimony or, with permission of the presiding officer, present the testimony. If the excluded evidence consists of a document or exhibit, it

shall be marked as part of an offer of proof and inserted in the record.

**645—11.21(17A) Default.**

**11.21(1)** If a party fails to appear or participate in a contested case proceeding after proper service of notice, the presiding officer may, if no adjournment is granted, enter a default decision or proceed with the hearing and render a decision in the absence of the party.

**11.21(2)** Where appropriate and not contrary to law, any party may move for default against a party who has failed to appear after proper service.

**11.21(3)** Default decisions or decisions rendered on the merits after a party has failed to appear or participate in a contested case proceeding become final agency action unless, within 15 days after the date of notification or mailing of the decision, a motion to vacate is filed and served on all parties or an appeal of a decision on the merits is timely initiated. A motion to vacate must state all facts relied upon by the moving party which establish that good cause existed for that party's failure to appear or participate at the contested case proceeding. Each fact so stated must be substantiated by at least one sworn affidavit of a person with personal knowledge of each such fact, which affidavit(s) must be attached to the motion.

**11.21(4)** The time for further appeal of a decision for which a timely motion to vacate has been filed is stayed pending a decision on the motion to vacate.

**11.21(5)** Properly substantiated and timely filed motions to vacate shall be granted only for good cause shown. The burden of proof as to good cause is on the moving party. Adverse parties shall have ten days to respond to a motion to vacate. Adverse parties shall be allowed to conduct discovery as to the issue of good cause and to present evidence on the issue prior to a decision on the motion, if a request to do so is included in that party's response.

**11.21(6)** "Good cause" for purposes of this rule shall have the same meaning as "good cause" for setting aside a default judgment under Iowa Rule of Civil Procedure 236.

**11.21(7)** A decision denying a motion to vacate is subject to further appeal within the time limit allowed for further appeal of a decision on the merits in the contested case proceeding. A decision granting a motion to vacate is subject to interlocutory appeal by the adverse party pursuant to rule 11.24(17A).

**11.21(8)** If a motion to vacate is granted and no timely interlocutory appeal has been taken, the presiding officer shall issue another notice of hearing and the contested case shall proceed accordingly.

**11.21(9)** A default decision may provide either that the default decision is to be stayed pending a timely motion to vacate or that the default decision is to take effect immediately, subject to a request for stay under rule 11.26(17A).

**645—11.22(17A) Ex parte communication.**

**11.22(1)** Prohibited communications. Unless required for the disposition of ex parte matters specifically authorized by statute, following issuance of the notice of hearing, there shall be no communication, directly or indirectly, between the presiding officer and any party or representative of any party or any other person with a direct or indirect interest in such case in connection with any issue of fact or law in the case except upon notice and opportunity for all parties to participate. Nothing in this provision is intended to preclude board members from communicating with other board members or members of the board staff, other than those with a personal interest in, or those engaged in personally investi-

## PROFESSIONAL LICENSURE DIVISION[645](cont'd)

gating, prosecuting, or advocating in, either the case under consideration or a pending factually related case involving the same parties, as long as those persons do not directly or indirectly communicate to the presiding officer any ex parte communications they have received of a type that the presiding officer would be prohibited from receiving or that furnish, augment, diminish, or modify the evidence in the record.

**11.22(2)** Prohibitions on ex parte communications commence with the issuance of the notice of hearing in a contested case and continue for as long as the case is pending before the board.

**11.22(3)** Written, oral or other forms of communication are "ex parte" if made without notice and opportunity for all parties to participate.

**11.22(4)** To avoid prohibited ex parte communications notice must be given in a manner reasonably calculated to give all parties a fair opportunity to participate. Notice of written communications shall be provided in compliance with rule 11.6(17A) and may be supplemented by telephone, facsimile, electronic mail or other means of notification. Where permitted, oral communications may be initiated through conference telephone call including all parties or their representatives.

**11.22(5)** Persons who jointly act as presiding officer in a pending contested case may communicate with each other without notice or opportunity for parties to participate.

**11.22(6)** The board administrator or other persons may be present in deliberations or otherwise advise the presiding officer without notice or opportunity for parties to participate as long as they are not disqualified from participating in the making of a final decision under any provision of law and they comply with this rule.

**11.22(7)** Communications with the presiding officer involving uncontested scheduling or procedural matters do not require notice or opportunity for parties to participate. Parties should notify other parties prior to initiating such contact with the presiding officer when feasible, and shall notify other parties when seeking to continue hearings or other deadlines.

**11.22(8)** A presiding officer who receives a prohibited ex parte communication during the pendency of a contested case must initially determine if the effect of the communication is so prejudicial that the presiding officer should be disqualified. If the presiding officer determines that disqualification is warranted, a copy of any prohibited written communication, all written responses to the communication, a written summary stating the substance of any prohibited oral or other communication not available in written form for disclosure, all responses made, and the identity of each person from whom the presiding officer received a prohibited ex parte communication shall be submitted for inclusion in the record under seal by protective order. If the presiding officer determines that disqualification is not warranted, such documents shall be submitted for inclusion in the record and served on all parties. Any party desiring to rebut the prohibited communication must be allowed the opportunity to do so upon written request filed within ten days after notice of the communication.

**11.22(9)** Promptly after being assigned to serve as presiding officer at any stage in a contested case proceeding, a presiding officer shall disclose to all parties material factual information received through ex parte communication prior to such assignment unless the factual information has already been or shortly will be disclosed pursuant to Iowa Code section 17A.13(2) or through discovery. Factual information

contained in an investigative report or similar document need not be separately disclosed by the presiding officer as long as such documents have been or will shortly be provided to the parties.

**11.22(10)** The presiding officer may render a proposed or final decision imposing appropriate sanctions for violations of this rule including default, a decision against the offending party, censure, suspension or revocation of the privilege to practice before the agency. Violation of ex parte communication prohibitions by board personnel shall be reported to the board and its board administrator for possible sanctions including censure, suspension, dismissal, or other disciplinary action.

**645—11.23(17A) Recording costs.** Upon request, the board shall provide a copy of the whole or any portion of the record at cost. The cost of preparing a copy of the record or of transcribing the hearing record shall be paid by the requesting party.

**645—11.24(17A) Interlocutory appeals.** Upon written request of a party or on its own motion, the board may review an interlocutory order of the board administrator or an administrative law judge. Any request for interlocutory review must be filed within 14 days of issuance of the challenged order, but no later than the time for compliance with the order or the date of hearing, whichever is first.

**645—11.25(17A) Applications for rehearing.**

**11.25(1)** By whom filed. Any party to a contested case proceeding may file an application for rehearing from a final order. The filing of an application for rehearing is not necessary to exhaust administrative remedies for purposes of judicial review.

**11.25(2)** Content of application. The application for rehearing shall state on whose behalf it is filed, the specific grounds for rehearing, and the relief sought. In addition, the application shall state whether the applicant desires reconsideration of all or part of the agency decision on the existing record and whether the applicant requests an opportunity to submit additional evidence.

**11.25(3)** Additional evidence. A party may request the taking of additional evidence only by establishing that (a) the facts or other evidence arose after the original proceeding, or (b) the party offering such evidence could not reasonably have provided such evidence at the original proceedings, or (c) the party offering the additional evidence was misled by any party as to the necessity for offering such evidence at the original proceeding. A written request to present additional evidence must be filed with the application for rehearing or, by a nonappealing party, within 14 days of service of the notice of appeal.

**11.25(4)** Time of filing. The application shall be filed with the board within 20 days after issuance of the final decision.

**11.25(5)** Notice to other parties. A copy of the application shall be timely mailed by the applicant to all parties of record not joining therein.

**11.25(6)** Disposition. Any application for a rehearing shall be deemed denied unless the agency grants the application within 20 days after its filing.

**645—11.26(17A) Stays of agency actions.**

**11.26(1)** When available. Any party to a contested case proceeding may petition the board for a stay of an order issued in that proceeding or for other temporary remedies, pending review by the board or pending judicial review. The

## PROFESSIONAL LICENSURE DIVISION[645](cont'd)

petition shall state the reasons justifying a stay or other temporary remedy.

**11.26(2)** When granted. In determining whether to grant a stay, the board shall consider the factors listed in 1998 Iowa Acts, chapter 1202, section 23.

**645—11.27(17A) No factual dispute contested cases.** If the parties agree that no dispute of material fact exists as to a matter that would be a contested case if such a dispute of fact existed, the parties may present all relevant admissible evidence either by stipulation or otherwise as agreed by the parties, without necessity for the production of evidence at an evidentiary hearing. If such agreement is reached, a jointly submitted schedule detailing the method and timetable for submission of the record, briefs and oral argument should be submitted to the presiding officer for approval as soon as practicable.

**645—11.28(17A) Emergency adjudicative proceedings.**

**11.28(1)** Necessary emergency action. To the extent necessary to prevent or avoid immediate danger to the public health, safety, or welfare, and consistent with the Constitution and other provisions of law, the board may issue a written order in compliance with Iowa Code section 17A.18 to suspend a license in whole or in part, order the cessation of any continuing activity, order affirmative action, or take other action within the jurisdiction of the board by emergency adjudicative order.

**11.28(2)** Before issuing an emergency adjudicative order, the board shall consider factors including, but not limited to, the following:

a. Whether there has been a sufficient factual investigation to ensure that the board is proceeding on the basis of reliable information;

b. Whether the specific circumstances which pose immediate danger to the public health, safety or welfare have been identified and determined to be continuing;

c. Whether the person required to comply with the emergency adjudicative order may continue to engage in other activities without posing immediate danger to the public health, safety or welfare;

d. Whether imposition of monitoring requirements or other interim safeguards would be sufficient to protect the public health, safety or welfare; and

e. Whether the specific action contemplated by the board is necessary to avoid the immediate danger.

**11.28(3)** Issuance of order.

a. An emergency adjudicative order shall contain findings of fact, conclusions of law, and policy reasons to justify the determination of an immediate danger in the board's decision to take immediate action. The order is a public record.

b. The written emergency adjudicative order shall be immediately delivered to the person who is required to comply with the order by utilizing one or more of the following procedures:

(1) Personal delivery;

(2) Certified mail, return receipt requested, to the last address on file with the agency;

(3) Certified mail to the last address on file with the agency; or

(4) Fax. Fax may be used as the sole method of delivery if the person required to comply with the order has filed a written request that agency orders be sent by fax and has provided a fax number for that purpose.

c. To the degree practicable, the board shall select the procedure for providing written notice that best ensures prompt, reliable delivery.

d. Unless the written emergency adjudicative order is provided by personal delivery on the same day that the order issues, the board shall make reasonable immediate efforts to contact by telephone the person who is required to comply with the order.

e. After the issuance of an emergency adjudicative order, the board shall proceed as quickly as feasible to complete any proceedings that would be required if the matter did not involve an immediate danger.

f. Issuance of a written emergency adjudicative order shall include notification of the date on which board proceedings are scheduled for completion. After issuance of an emergency adjudicative order, continuance of further board proceedings to a later date will be granted only in compelling circumstances upon application in writing unless the person who is required to comply with the order is the party requesting the continuance.

**645—11.29(17A) Appeal.** Any appeal to district court from a decision in a contested case shall be taken within 30 days from the date of issuance of the decision by the board pursuant to Iowa Code section 17A.19 as amended by 1998 Iowa Acts, chapter 1202.

**645—11.30(272C) Publication of decisions.** Final decisions of the board in a contested case shall be transmitted to the appropriate association, the news media, and the employer.

**645—11.31(272C) Reinstatement.**

**11.31(1)** Any person whose license to practice has been revoked or suspended may apply to the board for reinstatement in accordance with the terms and conditions of the order of revocation or suspension, unless the order of revocation provides that the license is permanently revoked.

**11.31(2)** If the order of revocation or suspension did not establish terms and conditions upon which reinstatement might occur, or if the license was voluntarily surrendered, an initial application for reinstatement may not be made until one year has elapsed from the date of the order or the date of the voluntary surrender.

**11.31(3)** All proceedings for reinstatement shall be initiated by the respondent, who shall file with the board an application for reinstatement of the license. Such application shall be docketed in the original case in which the license was revoked, suspended, or relinquished. All proceedings upon the application for reinstatement shall be subject to the same rules of procedure as other cases before the board.

**11.31(4)** An application for reinstatement shall allege facts which, if established, will be sufficient to enable the board to determine that the basis for the revocation or suspension of the respondent's license no longer exists and that it will be in the public interest for the license to be reinstated. The burden of proof to establish such facts shall be on the respondent.

**11.31(5)** An order denying or granting reinstatement shall be based upon a decision which incorporates findings of facts and conclusions of law. The order shall be published as provided for in this chapter.

**645—11.32(17A,272C) License denial.**

**11.32(1)** An applicant who has been denied licensure by the board may appeal the denial and request a hearing on the issues related to the licensure denial by serving a notice of appeal and request for hearing upon the board not more than 30 days following the date of mailing of the notification of licensure denial to the applicant. The request for hearing

## PROFESSIONAL LICENSURE DIVISION[645](cont'd)

shall specifically delineate the facts to be contested at hearing.

**11.32(2)** All hearings held pursuant to this rule shall be held pursuant to the process outlined in this chapter.

These rules are intended to implement Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202.

ITEM 6. Adopt a **new 645—Chapter 12**, “Informal Settlement,” as follows:

CHAPTER 12  
INFORMAL SETTLEMENT

**645—12.1(17A,272C) Informal settlement.**

**12.1(1)** Informal settlement—parties. A contested case may be resolved by informal settlement. Negotiation of an informal settlement may be initiated by the state of Iowa represented by an assistant attorney general, the respondent, or the board. The board shall designate a board member with authority to negotiate on behalf of the board. The full board shall not be involved in negotiations until the presentation of a final, written, signed informal settlement to the full board for approval.

**12.1(2)** Informal settlement—waiver of notice and opportunity to be heard. Consent to negotiation by a respondent constitutes a waiver of notice and opportunity to be heard pursuant to Iowa Code chapter 17A during informal settlement negotiation, and the assistant attorney general is thereafter authorized to discuss informal settlement with the board’s designee until that consent is expressly withdrawn.

**12.1(3)** Informal settlement—board approval. All informal settlements are subject to approval of a majority of the board. No informal settlement shall be presented to the board for approval except in final, written form executed by the respondent. If the board fails to approve the informal settlement, it shall be of no force or effect to either party.

**12.1(4)** Informal settlement—disqualification of designee. A board member who is designated to act in negotiation of settlement is not disqualified from participating in the contested case should the case proceed to hearing.

**12.1(5)** Voluntary surrender. The board may accept the voluntary surrender of a license if accompanied by a written statement of intention. A voluntary surrender, when accepted in connection with a disciplinary proceeding, has the same force and effect as an order of revocation.

This rule is intended to implement Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202, and Iowa Code chapter 272C.

ITEM 7. Adopt a **new 645—Chapter 13**, “Discipline,” as follows:

CHAPTER 13  
DISCIPLINE

**645—13.1(272C) Method of discipline.** The board has the authority to impose the following disciplinary sanctions:

1. Revocation of license.
2. Suspension of license until further order of the board or for a specific period.
3. Prohibit permanently, until further order of the board, or for a specific period, the engaging in specified procedures, methods, or acts.
4. Probation.
5. Require additional education or training.
6. Require a reexamination.
7. Order a physical or mental evaluation, or order alcohol and drug screening within a time specified by the board.

8. Impose civil penalties not to exceed \$1000.
9. Issue a citation and warning.
10. Such other sanctions allowed by law as may be appropriate.

**645—13.2(272C) Discretion of board.** The following factors may be considered by the board in determining the nature and severity of the disciplinary sanction to be imposed:

1. The relative serious nature of the violation as it relates to assuring the citizens of this state a high standard of professional care.
2. The facts of the particular violation.
3. Any extenuating facts or other countervailing considerations.
4. The number of prior violations or complaints.
5. The seriousness of prior violations or complaints.
6. Whether remedial action has been taken.
7. Such other factors as may reflect upon the competency, ethical standards, and professional conduct of the licensee.

**645—13.3(272C) Conduct of persons attending meetings.**

**13.3(1)** The person presiding at a meeting of the board may exclude a person from an open meeting for behavior that obstructs the meeting.

**13.3(2)** Cameras and recording devices may be used at open meetings provided they do not obstruct the meeting. If the user of a camera or recording device obstructs the meeting by the use of such device, the person presiding may request the person to discontinue use of the camera or device. If the person persists in use of the device or camera, that person shall be ordered excluded from the meeting by order of the board member at the meeting.

These rules are intended to implement Iowa Code sections 21.7, 272C.4, 272C.5, and 272C.6.

ITEM 8. Adopt a **new 645—Chapter 14**, “Child Support Noncompliance,” as follows:

CHAPTER 14  
CHILD SUPPORT NONCOMPLIANCE

**645—14.1(252J) Adoption by reference.** The division of professional licensure hereby adopts 641—Chapter 192, “Child Support Noncompliance,” as 645—Chapter 14, with the following amendment:

“Board” means a particular professional licensing board in the division of professional licensure.

These rules are intended to implement Iowa Code chapter 252J.

ITEM 9. Adopt a **new 645—Chapter 15**, “Noncompliance of Loan Repayment,” as follows:

CHAPTER 15  
NONCOMPLIANCE OF LOAN REPAYMENT

**645—15.1(261) Adoption by reference.** The division of professional licensure hereby adopts 641—Chapter 195, “Noncompliance of Loan Repayment,” to appear as 645—Chapter 15.

These rules are intended to implement Iowa Code chapter 261.

ITEM 10. Adopt a **new 645—Chapter 16**, “Impaired Practitioner Review Committee,” as follows:

CHAPTER 16  
IMPAIRED PRACTITIONER REVIEW COMMITTEE

## PROFESSIONAL LICENSURE DIVISION[645](cont'd)

The division of professional licensure hereby adopts 641—Chapter 193, “Impaired Practitioner Review Committee,” as 645—Chapter 16, with the following amendment:

**645—16.1(272C) Impaired practitioner review committee.****16.1(1) Definitions.**

“Board” means a particular professional licensing board in the division of professional licensure.

These rules are intended to implement Iowa Code chapter 272C.

ITEM 11. Adopt a **new 645—Chapter 17**, “Materials for Board Review,” as follows:

CHAPTER 17  
MATERIALS FOR BOARD REVIEW

**645—17.1(147) Materials for board review.** Materials received at least one week before a regularly scheduled meeting shall be placed on the agenda for board review. Materials from emergency or unusual circumstances may be added to the agenda with the chairperson’s approval. All other materials received after this deadline will be reviewed at the next regularly scheduled meeting of the board.

This rule is intended to implement Iowa Code chapter 147.

**ARC 8833A**

**PROFESSIONAL LICENSURE  
DIVISION[645]**

BOARD OF CHIROPRACTIC EXAMINERS

**Notice of Intended Action**

Twenty-five interested persons, a governmental subdivision, an agency or association of 25 or more persons may demand an oral presentation hereon as provided in Iowa Code section 17A.4(1)“b.”

Notice is also given to the public that the Administrative Rules Review Committee may, on its own motion or on written request by any individual or group, review this proposed action under section 17A.8(6) at a regular or special meeting where the public or interested persons may be heard.

Pursuant to the authority of Iowa Code section 151.11, the Board of Chiropractic Examiners hereby gives Notice of Intended Action to amend Chapter 40, “Chiropractic Examiners,” and to rescind Chapter 41, “Child Support Noncompliance,” Chapter 42, “Impaired Practitioner Review Committee,” and Chapter 49, “Public Records and Fair Information Practices,” Iowa Administrative Code.

The amendments rescind the rules and chapters that are duplications of those found under the division of professional licensure to cover all examining boards in the division.

Any interested person may make written comments on the proposed amendments not later than April 14, 1999, addressed to Marge Bledsoe, Professional Licensure, Department of Public Health, Lucas State Office Building, Des Moines, Iowa 50319-0075.

There will be a public hearing on April 15, 1999, from 9 to 11 a.m. in the Professional Licensure Conference Room, Lucas State Office Building, Fifth Floor, Des Moines, Iowa 50319-0075. Persons may present their views at the public hearing either orally or in writing. At the hearing, persons will be asked to give their names and addresses for the record

and to confine their remarks to the subject of the amendments.

The Board has determined that the amendments will have no impact on small business within the meaning of Iowa Code section 17A.31C.

The amendments are intended to implement Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202, and Iowa Code chapters 151 and 272C.

The following amendments are proposed.

ITEM 1. Rescind and reserve rules **645—40.21(151, 272C)** to **645—40.23(272C)** and **645—40.25(272C)** to **645—40.35(272C)**.

ITEM 2. Amend rule 645—40.24(272C), introductory paragraph, as follows:

**645—40.24(272C) Grounds for discipline.** The board may impose any of the disciplinary sanctions set forth in rule 40.22 **645—13.1(151, 272C)**, including civil penalties in an amount not to exceed \$1000, when the board determines that the licensee is guilty of any of the following acts or offenses:

ITEM 3. Rescind and reserve **645—40.47(147, 151, 17A, 272C)**.

ITEM 4. Rescind and reserve **Chapter 41**, “Child Support Noncompliance,” **Chapter 42**, “Impaired Practitioner Review Committee,” and **Chapter 49**, “Public Records and Fair Information Practices.”

**ARC 8840A**

**PROFESSIONAL LICENSURE  
DIVISION[645]**

**Notice of Intended Action**

Twenty-five interested persons, a governmental subdivision, an agency or association of 25 or more persons may demand an oral presentation hereon as provided in Iowa Code section 17A.4(1)“b.”

Notice is also given to the public that the Administrative Rules Review Committee may, on its own motion or on written request by any individual or group, review this proposed action under section 17A.8(6) at a regular or special meeting where the public or interested persons may be heard.

Pursuant to the authority of Iowa Code section 147.76, the Board of Psychology Examiners hereby gives Notice of Intended Action to amend Chapter 240, “Board of Psychology Examiners,” and to rescind Chapter 241, “Child Support Noncompliance,” Chapter 242, “Impaired Practitioner Review Committee,” and Chapter 249, “Public Records and Fair Information Practices,” Iowa Administrative Code.

The amendments rescind chapters and rules that are duplications of those that are found under the division of professional licensure to cover all examining boards in the division. Language allowing civil penalties not to exceed \$1000 is added to 350.26(272C).

Any interested person may make written comments on the proposed amendments not later than April 14, 1999, addressed to Marge Bledsoe, Professional Licensure, Department of Public Health, Lucas State Office Building, Des Moines, Iowa 50319-0075.

There will be a public hearing on April 15, 1999, from 9 to 11 a.m. in the Professional Licensure Conference Room, Lucas State Office Building, Fifth Floor, Des Moines, Iowa 50319-0075. Persons may present their views at the public hearing either orally or in writing. At the hearing, persons will be asked to give their names and addresses for the record

## PROFESSIONAL LICENSURE DIVISION[645](cont'd)

and to confine their remarks to the subject of the amendments.

The Board has determined that the amendments will have no impact on small business within the meaning of Iowa Code section 17A.31C.

The amendments are intended to implement Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202, and Iowa code chapters 154B and 272C.

The following amendments are proposed.

ITEM 1. Rescind and reserve **645—240.200(258A)** to **645—240.211(258A)** and **645—240.213(272C)** to **645—240.300(21)**.

ITEM 2. Amend rule **645—240.212(258A)**, introductory paragraph, as follows:

**645—240.212(258A) Suspension, revocation, or probation. Grounds for discipline.** The board may ~~revoke or suspend a license, or place a licensee on probation for~~ *impose any of the disciplinary sanctions set forth in rule 645—13.1(272C), including civil penalties in an amount not to exceed \$1000, when the board determines that a licensee is guilty of any of the following acts or offenses:*

ITEM 3. Rescind and reserve **645—Chapter 241**, "Child Support Noncompliance," **645—Chapter 242**, "Impaired Practitioner Review Committee," and **645—Chapter 249**, "Public Records and Fair Information Practices."

**ARC 8832A**

## PROFESSIONAL LICENSURE DIVISION[645]

BOARD OF SOCIAL WORK EXAMINERS

### Notice of Intended Action

Twenty-five interested persons, a governmental subdivision, an agency or association of 25 or more persons may demand an oral presentation hereon as provided in Iowa Code section 17A.4(1)"b."

Notice is also given to the public that the Administrative Rules Review Committee may, on its own motion or on written request by any individual or group, review this proposed action under section 17A.8(6) at a regular or special meeting where the public or interested persons may be heard.

Pursuant to the authority of Iowa Code section 147.76, the Board of Social Work Examiners hereby gives Notice of Intended Action to amend Chapter 280, "Board of Social Work Examiners," and to rescind Chapter 281, "Agency Procedure For Rule Making," Chapter 282, "Petitions For Rule Making," Chapter 283, "Declaratory Rulings," Chapter 284, "Child Support Noncompliance," Chapter 285, "Impaired Practitioner Review Committee," and Chapter 289, "Public Records and Fair Information Practices," Iowa Administrative Code.

These amendments clarify by definition the meaning of the term "private practice" as it relates to the practice of social work, change the continuing education reporting period to coincide with the renewal period, further specify provider approved programs, and ensure that social workers are accountable for receiving proper supervision in their practice and profession. These amendments also rescind rules and chapters that are duplications of those adopted by the division for all boards in professional licensure.

Any interested person may make written or oral suggestions or comments on these proposed amendments on or before April 13, 1999. Comments should be directed to Rox-

anne Sparks, Bureau of Professional Licensure, Department of Public Health, Lucas State Office Building, 5th Floor, Des Moines, Iowa 50319-0075.

A public hearing will be held on April 14, 1999, from 9 to 11 a.m., in the Fifth Floor Board Room, Lucas State Office Building, at which time persons may present their views either orally or in writing. At the hearing, persons will be asked to give their names and addresses for the record and to confine their remarks to the subject of the proposed amendments.

The Board has determined that the amendments will have no impact on small business within the meaning of Iowa Code section 17A.31.

ITEM 1. Amend rule **645—280.1(154C)** by adding the following definition.

"Private practice" means social work practice conducted only by an LISW who is either self-employed or a member of a partnership or of a group practice providing diagnosis and treatment of mental and emotional disorders or conditions. In this context, "group practice" means an association of professionals in which an LISW is independently engaged in the practice of social work and has ongoing control of the clinical, financial, administrative, and professional arrangements between the LISW and the clients/patients of the LISW.

ITEM 2. Amend subrule 280.100(1) as follows:

**280.100(1)** The biennial continuing education compliance period shall extend from ~~July 1 January 1~~ of each ~~even odd-~~ numbered year to ~~June 30 December 31~~ of the ~~next~~ *each* even-numbered year. During this period of time 27 hours of approved continuing education shall be obtained by the licensee in order to renew the license for ~~the next~~ *each* biennial license period beginning January 1 of the ~~next~~ *each* odd-numbered year. Three hours of the 27 must be specifically in ethics. *(To implement this rule change, the continuing education period for the December 31, 2000, renewal will run from July 1, 1998, to December 31, 2000).*

ITEM 3. Amend subrule 280.101(2) as follows:

**280.101(2)** A continuing education activity shall be qualified for approval if the provider-approved program meets the content areas set out by the board in subrule 280.102(1) *or any continuing education activity offered by AASSWB Approved Continuing Education (ACE) Program.*

ITEM 4. Amend subrule 280.105(2) as follows:

**280.105(2)** By ~~July 20 December 31~~ of each even-numbered year, each licensee will be required to submit a licensee's report of continuing education to the board *on a form provided by the board. Report of Continuing Education forms will be mailed to each licensee with the renewal notice as outlined in 280.6(2).* The board will select licensees whose continuing education reports will be audited by the board. Each licensee to be audited will be required to provide copies of certificates of attendance for all reported activities. Additional documentation may be required.

ITEM 5. Rescind and reserve rules **645—280.200(154C)** to **645—280.211(272C)**.

ITEM 6. Amend rule **645—280.212(272C)**, introductory paragraph, as follows:

**645—280.212(272C) Grounds for discipline.** The board may impose any of the disciplinary sanctions provided in rule ~~645—280.211(272C)~~ **645—13.1(272C)**, *including civil penalties in an amount not to exceed \$1000, when the board de-*

## PROFESSIONAL LICENSURE DIVISION[645](cont'd)

termines that the licensee is guilty of any of the following acts or offenses:

ITEM 7. Amend subrule **280.213(6)** by relettering paragraphs "a" to "d" as "b" to "e" and adding the following new paragraph "a":

a. Practice without receiving supervision as needed, given the licensee's level of practice, experience, and need.

ITEM 8. Rescind and reserve **Chapter 281**, "Agency Procedure for Rule Making," **Chapter 282**, "Petitions For Rule Making," **Chapter 283**, "Declaratory Rulings," **Chapter 284**, "Child Support Noncompliance," **Chapter 285**, "Impaired Practitioner Review Committee," and **Chapter 289**, "Public Records and Fair Information Practices."

**ARC 8831A****PROFESSIONAL LICENSURE  
DIVISION[645]**

BOARD OF ATHLETIC TRAINING EXAMINERS

**Notice of Intended Action**

Twenty-five interested persons, a governmental subdivision, an agency or association of 25 or more persons may demand an oral presentation hereon as provided in Iowa Code section 17A.4(1)"b."

Notice is also given to the public that the Administrative Rules Review Committee may, on its own motion or on written request by any individual or group, review this proposed action under section 17A.8(6) at a regular or special meeting where the public or interested persons may be heard.

Pursuant to the authority of Iowa Code section 147.76, the Board of Athletic Training Examiners hereby gives Notice of Intended Action to amend Chapter 350, "Athletic Trainer," and to rescind Chapter 355, "Petitions For Rule Making," Chapter 356, "Declaratory Rulings," Chapter 357, "Agency Procedure for Rule Making," and Chapter 358, "Public Records and Fair Information Practices," Iowa Administrative Code.

The amendments rescind the rules and chapters that are duplications of those that are found under the division of professional licensure to cover all examining boards in the division. Language allowing civil penalties not to exceed \$1000 is added to 350.26(272C).

Any interested person may make written comments on the proposed amendments not later than April 14, 1999, addressed to Marge Bledsoe, Professional Licensure, Department of Public Health, Lucas State Office Building, Des Moines, Iowa 50319-0075.

There will be a public hearing on April 15, 1999, from 9 to 11 a.m. in the Professional Licensure Conference Room, Lucas State Office Building, Fifth Floor, Des Moines, Iowa 50319-0075. Persons may present their views at the public hearing either orally or in writing. At the hearing, persons will be asked to give their names and addresses for the record and to confine their remarks to the subject of the amendments.

The Board has determined that the amendments will have no impact on small business within the meaning of Iowa Code section 17A.31C.

The amendments are intended to implement Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202, and Iowa Code chapters 152D and 272C.

The following amendments are proposed.

ITEM 1. Rescind and reserve **645—350.22(272C)** to **645—350.25(272C)** and **645—350.27(272C)** to **645—350.30(272C)**.

ITEM 2. Amend 645—350.26(272C), introductory sentence, as follows:

**645—350.26(272C) Grounds for discipline.** The board may impose any of the disciplinary sanctions provided in rule 645—350.25 13.1(272C), *including civil penalties in an amount not to exceed \$1000*, when the board determines that the licensee is guilty of any of the following acts or offenses:

ITEM 3. Rescind and reserve **645—Chapter 355**, "Petitions for Rule Making," **645—Chapter 356**, "Declaratory Rulings," **645—Chapter 357**, "Agency Procedure For Rule Making" and **645—Chapter 358**, "Public Records and Fair Information Practices."

**ARC 8852A****PUBLIC HEALTH  
DEPARTMENT[641]****Notice of Intended Action**

Twenty-five interested persons, a governmental subdivision, an agency or association of 25 or more persons may demand an oral presentation hereon as provided in Iowa Code section 17A.4(1)"b."

Notice is also given to the public that the Administrative Rules Review Committee may, on its own motion or on written request by any individual or group, review this proposed action under section 17A.8(6) at a regular or special meeting where the public or interested persons may be heard.

Pursuant to the authority of Iowa Code section 135.11, the Department of Public Health hereby gives Notice of Intended Action to rescind Chapter 171, "Administrative Rules," Chapter 172, "Declaratory Rulings," and Chapter 173, "Administrative Hearings," Iowa Administrative Code, and adopt new Chapter 171, "Petitions for Rule Making," Chapter 172, "Declaratory Orders," and Chapter 173, "Contested Cases."

These chapters are being rescinded and new chapters adopted to revise the department's rules on petitions for rule making, declaratory orders, and contested cases in accordance with changes to the Iowa Administrative Procedure Act required by 1998 Iowa Acts, chapter 1202.

Any interested person may make written suggestions or comments on or before April 13, 1999. Such written comments should be addressed to Jennifer Hart, Bureau of Public Affairs, Department of Public Health, Lucas State Office Building, Des Moines, Iowa 50319-0075. Persons who wish to convey their views orally should contact Jennifer Hart at (515)281-7701 or at the Department's address noted above.

These rules are intended to implement Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202.

The following amendments are proposed.

ITEM 1. Rescind 641—Chapter 171 and adopt the following new chapter in lieu thereof:

**CHAPTER 171****PETITIONS FOR RULE MAKING**

**641—171.1(17A) Petition for rule making.**

**171.1(1)** Any person or agency may file a petition for rule making with the Director, Department of Public Health, Lucas State Office Building, Des Moines, Iowa 50319-0075. A petition is deemed filed when it is received by that office. The department must provide the petitioner with a file-

PUBLIC HEALTH DEPARTMENT[641](cont'd)

stamped copy of the petition if the petitioner provides the agency an extra copy for this purpose. The petition must be typewritten, or legibly handwritten in ink and must substantially conform to the following form:

BEFORE THE DEPARTMENT OF PUBLIC HEALTH

Petition by (Name of Petitioner) for the (adoption, amendment, or repeal) of rules relating to (state subject matter).	}	PETITION FOR RULE MAKING
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The petition must provide the following information:

1. A statement of the specific rule-making action sought by the petitioner including the text or a summary of the contents of the proposed rule or amendment to a rule and, if it is a petition to amend or repeal a rule, a citation and the relevant language to the particular portion or portions of the rule proposed to be amended or repealed.
2. A citation to any law deemed relevant to the department's authority to take the action urged or to the desirability of that action.
3. A brief summary of petitioner's arguments in support of the action urged in the petition.
4. A brief summary of any data supporting the action urged in the petition.
5. The names and addresses of other persons, or a description of any class of persons, known by petitioner to be affected by or interested in, the proposed action which is the subject of the petition.
6. Any request by petitioner for a meeting provided for by rule 171.4(17A).

**171.1(2)** The petition must be dated and signed by the petitioner or the petitioner's representative. It must also include the name, mailing address, and telephone number of the petitioner and petitioner's representative, and a statement indicating the person to whom communications concerning the petition should be directed.

**171.1(3)** The department may deny a petition because it does not substantially conform to the required form.

**641—171.2(17A) Briefs.** The petitioner may attach a brief to the petition in support of the action urged in the petition. The department may request a brief from the petitioner or from any other person concerning the substance of the petition.

**641—171.3(17A) Inquiries.** Inquiries concerning the status of a petition for rule making may be made to the Director, Department of Public Health, Lucas State Office Building, Des Moines, Iowa 50319-0075.

**641—171.4(17A) Department consideration.**

**171.4(1)** Within 14 days after the filing of a petition, the department must submit a copy of the petition and any accompanying brief to the administrative rules coordinator and to the administrative rules review committee. Upon request by petitioner in the petition, the department must schedule a brief and informal meeting between the petitioner and a member of the staff of the department, to discuss the petition. The department may request the petitioner to submit additional information or argument concerning the petition. The department may also solicit comments from any person on the substance of the petition. Also, comments on the substance of the petition may be submitted to the department by any person.

**171.4(2)** Within 60 days after the filing of the petition, or within any longer period agreed to by the petitioner, the department must, in writing, deny the petition, and notify petitioner of its action and the specific grounds for the denial, or grant the petition and notify petitioner that it has instituted rule-making proceedings on the subject of the petition. Petitioner shall be deemed notified of the denial or grant of the petition on the date when the department mails or delivers the required notification to petitioner.

**171.4(3)** Denial of a petition because it does not substantially conform to the required form does not preclude the filing of a new petition on the same subject that seeks to eliminate the grounds for the agency's rejection of the petition.

These rules are intended to implement Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202.

**ITEM 2.** Rescind 641—Chapter 172 and adopt the following new chapter in lieu thereof:

**CHAPTER 172  
DECLARATORY ORDERS**

**641—172.1(17A) Petition for declaratory order.** Any person may file a petition with the department of public health for a declaratory order as to the applicability to specified circumstances of a statute, rule, or order within the primary jurisdiction of the Department of Public Health, Lucas State Office Building, Des Moines, Iowa 50319-0075. A petition is deemed filed when it is received by that office. The department shall provide the petitioner with a file-stamped copy of the petition if the petitioner provides the department an extra copy for this purpose. The petition must be typewritten or legibly handwritten in ink and must substantially conform to the following form:

BEFORE THE DEPARTMENT OF PUBLIC HEALTH

Petition by (Name of Petitioner) for a Declaratory Order on (Cite provisions of law involved).	}	PETITION FOR DECLARATORY ORDER
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The petition must provide the following information:

1. A clear and concise statement of all relevant facts on which the order is requested.
2. A citation and the relevant language of the specific statutes, rules, policies, decisions, or orders, whose applicability is questioned, and any other relevant law.
3. The questions petitioner wants answered, stated clearly and concisely.
4. The answers to the questions desired by the petitioner and a summary of the reasons urged by the petitioner in support of those answers.
5. The reasons for requesting the declaratory order and disclosure of the petitioner's interest in the outcome.
6. A statement indicating whether the petitioner is currently a party to another proceeding involving the questions at issue and whether, to the petitioner's knowledge, those questions have been decided by, are pending determination by, or are under investigation by, any governmental entity.
7. The names and addresses of other persons, or a description of any class of persons, known by petitioner to be affected by, or interested in, the questions presented in the petition.
8. Any request by petitioner for a meeting provided for by 172.7(17A).

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The petition must be dated and signed by the petitioner or the petitioner's representative. It must also include the name, mailing address, and telephone number of the petitioner and petitioner's representative and a statement indicating the person to whom communications concerning the petition should be directed.

**641—172.2(17A) Notice of petition.** Within 15 days after receipt of a petition for a declaratory order, the department shall give notice of the petition to all persons not served by the petitioner pursuant to 172.6(17A) to whom notice is required by any provision of law. The department may also give notice to any other persons.

**641—172.3(17A) Intervention.**

**172.3(1)** Persons who qualify under any applicable provision of law as an intervenor and who file a petition for intervention within 20 days of the filing of a petition for declaratory order shall be allowed to intervene in a proceeding for a declaratory order.

**172.3(2)** Any person who files a petition for intervention at any time prior to the issuance of an order may be allowed to intervene in a proceeding for a declaratory order at the discretion of the department.

**172.3(3)** A petition for intervention shall be filed at the Department of Public Health, Lucas State Office Building, Des Moines, Iowa 50319-0075. Such a petition is deemed filed when it is received by that office. The department will provide the petitioner with a file-stamped copy of the petition for intervention if the petitioner provides an extra copy for this purpose. A petition for intervention must be typewritten or legibly handwritten in ink and must substantially conform to the following form:

BEFORE THE DEPARTMENT OF PUBLIC HEALTH

Petition by (Name of Original Petitioner) for a Declaratory Order on (Cite provisions of law cited in original petition).	}	PETITION FOR INTERVENTION
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The petition for intervention must provide the following information:

1. Facts supporting the intervenor's standing and qualifications for intervention.
2. The answers urged by the intervenor to the question or questions presented and a summary of the reasons urged in support of those answers.
3. Reasons for requesting intervention and disclosure of the intervenor's interest in the outcome.
4. A statement indicating whether the intervenor is currently a party to any proceeding involving the questions at issue and whether, to the intervenor's knowledge, those questions have been decided by, are pending determination by, or are under investigation by, any governmental entity.
5. The names and addresses of any additional persons, or a description of any additional class of persons, known by the intervenor to be affected by, or interested in, the questions presented.
6. Whether the intervenor consents to be bound by the determination of the matters presented in the declaratory order proceeding.

The petition must be dated and signed by the intervenor or the intervenor's representative. It must also include the name, mailing address, and telephone number of the intervenor

and intervenor's representative, and a statement indicating the person to whom communications should be directed.

**641—172.4(17A) Briefs.** The petitioner or any intervenor may file a brief in support of the position urged. The department may request a brief from the petitioner, any intervenor, or any other person concerning the questions raised.

**641—172.5(17A) Inquiries.** Inquiries concerning the status of a declaratory order proceeding may be made to the Director, Department of Public Health, Lucas State Office Building, Des Moines, Iowa 50319-0075.

**641—172.6(17A) Service and filing of petitions and other papers.**

**172.6(1) Service—when required.** Except where otherwise provided by law, every petition for declaratory order, petition for intervention, brief, or other paper filed in a proceeding for a declaratory order shall be served upon each of the parties of record to the proceeding, and on all other persons identified in the petition for declaratory order or petition for intervention as affected by or interested in the questions presented, simultaneously with their filing. The party filing a document is responsible for service on all parties and other affected or interested persons.

**172.6(2) Filing—when required.** All petitions for declaratory orders, petitions for intervention, briefs, or other papers in a proceeding for a declaratory order shall be filed with the Director, Department of Public Health, Lucas State Office Building, Des Moines, Iowa 50319-0075. All petitions, briefs, or other papers that are required to be served upon a party shall be filed simultaneously with the department.

**172.6(3) Method of service, time of filing, and proof of mailing.** Method of service, time of filing, and proof of mailing shall be as provided by 173.12(17A).

**641—172.7(17A) Consideration.** Upon request by petitioner, the department must schedule a brief and informal meeting between the original petitioner, all intervenors, and a member of the staff of the department, to discuss the questions raised. The department may solicit comments from any person on the questions raised. Also, comments on the questions raised may be submitted to the department by any person.

**641—172.8(17A) Action on petition.**

**172.8(1)** Within the time allowed by 1998 Iowa Acts, chapter 1202, section 13(5), after receipt of a petition for a declaratory order, the department or designee shall take action on the petition as required by 1998 Iowa Acts, chapter 1202, section 13(5).

**172.8(2)** The date of issuance of an order or of a refusal to issue an order is as defined in 173.2(17A).

**641—172.9(17A) Refusal to issue order.**

**172.9(1)** The department shall not issue a declaratory order where prohibited by 1998 Iowa Acts, chapter 1202, section 13(1), and may refuse to issue a declaratory order on some or all questions raised for the following reasons:

1. The petition does not substantially comply with the required form.
2. The petition does not contain facts sufficient to demonstrate that the petitioner will be aggrieved or adversely affected by the failure of the department to issue an order.
3. The department does not have jurisdiction over the questions presented in the petition.
4. The questions presented by the petition are also presented in a current rule making, contested case, or other

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agency or judicial proceeding, that may definitively resolve them.

5. The questions presented by the petition would more properly be resolved in a different type of proceeding or by another body with jurisdiction over the matter.

6. The facts or questions presented in the petition are unclear, overbroad, insufficient, or otherwise inappropriate as a basis upon which to issue an order.

7. There is no need to issue an order because the questions raised in the petition have been settled due to a change in circumstances.

8. The petition is not based upon facts calculated to aid in the planning of future conduct but is, instead, based solely upon prior conduct in an effort to establish the effect of that conduct or to challenge an agency decision already made.

9. The petition requests a declaratory order that would necessarily determine the legal rights, duties, or responsibilities of other persons who have not joined in the petition, intervened separately, or filed a similar petition and whose position on the questions presented may fairly be presumed to be adverse to that of petitioner.

10. The petitioner requests the department to determine whether a statute is unconstitutional on its face.

**172.9(2)** A refusal to issue a declaratory order must indicate the specific grounds for the refusal and constitutes final agency action on the petition.

**172.9(3)** Refusal to issue a declaratory order pursuant to this provision does not preclude the filing of a new petition that seeks to eliminate the grounds for the refusal to issue an order.

**645—172.10(17A) Contents of declaratory order—effective date.** In addition to the order itself, a declaratory order must contain the date of its issuance, the name of petitioner and all intervenors, the specific statutes, rules, policies, decisions, or orders involved, the particular facts upon which it is based, and the reasons for its conclusion. A declaratory order is effective on the date of issuance.

**641—172.11(17A) Copies of orders.** A copy of all orders issued in response to a petition for a declaratory order shall be mailed promptly to the original petitioner and all intervenors.

**641—172.12(17A) Effect of a declaratory order.** A declaratory order has the same status and binding effect as a final order issued in a contested case proceeding. It is binding on the department, the petitioner, and any intervenors and is applicable only in circumstances where the relevant facts and the law involved are indistinguishable from those on which the order was based. As to all other persons, a declaratory order serves only as precedent and is not binding on the department. The issuance of a declaratory order constitutes final agency action on the petition.

These rules are intended to implement Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202.

ITEM 3. Rescind 641—Chapter 173 and adopt the following **new** chapter in lieu thereof:

CHAPTER 173  
CONTESTED CASES

**641—173.1(17A) Scope and applicability.** This chapter applies to contested case proceedings conducted by the department of public health.

**641—173.2(17A) Definitions.** Except where otherwise specifically defined by law:

“Contested case” means a proceeding defined by Iowa Code section 17A.2(5) and includes any matter defined as a no factual dispute contested case under 1998 Iowa Acts, chapter 1202, section 14.

“Issuance” means the date of mailing of a decision or order or date of delivery if service is by other means unless another date is specified in the order.

“Party” means each person or agency named or admitted as a party or properly seeking and entitled as of right to be admitted as a party.

“Presiding officer” means an administrative law judge from the department of inspections and appeals or the director of the department or the members of a multimember board or commission.

“Proposed decision” means the presiding officer’s recommended findings of fact, conclusions of law, decision, and order in a contested case in which the department did not preside.

**641—173.3(17A) Time requirements.**

**173.3(1)** Time shall be computed as provided in Iowa Code subsection 4.1(34).

**173.3(2)** For good cause, the presiding officer may extend or shorten the time to take any action, except as precluded by statute or by rule. Except for good cause stated in the record, before extending or shortening the time to take any action, the presiding officer shall afford all parties an opportunity to be heard or to file written arguments.

**641—173.4(17A) Requests for contested case proceeding.** Any person claiming an entitlement to a contested case proceeding shall file a written request for such a proceeding within the time specified by the particular rules or statutes governing the subject matter or, in the absence of such law, the time specified in the agency action in question.

The request for a contested case proceeding should state the name and address of the requester, identify the specific department action which is disputed, and where the requester is represented by a lawyer identify the provisions of law or precedent requiring or authorizing the holding of a contested case proceeding in the particular circumstances involved, and include a short and plain statement of the issues of material fact in dispute.

**641—173.5(17A) Notice of hearing.**

**173.5(1)** Delivery. Delivery of the notice of hearing constitutes the commencement of the contested case proceeding. Delivery may be executed by:

- a. Personal service as provided in the Iowa Rules of Civil Procedure; or
- b. Certified mail, return receipt requested; or
- c. First-class mail; or
- d. Publication, as provided in the Iowa Rules of Civil Procedure.

**173.5(2)** Contents. The notice of hearing shall contain the following information:

- a. A statement of the time, place, and nature of the hearing;
- b. A statement of the legal authority and jurisdiction under which the hearing is to be held;
- c. A reference to the particular sections of the statutes and rules involved;
- d. A short and plain statement of the matters asserted. If the department or other party is unable to state the matters in detail at the time the notice is served, the initial notice may be limited to a statement of the issues involved. Thereafter, upon application, a more definite and detailed statement shall be furnished;

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e. Identification of all parties including the name, address and telephone number of the person who will act as advocate for the department or the state and of parties' counsel where known;

f. Reference to the procedural rules governing conduct of the contested case proceeding;

g. Reference to the procedural rules governing informal settlement;

h. Identification of the presiding officer, if known. If not known, a description of who will serve as presiding officer; and

i. Notification of the time period in which a party may request, pursuant to 1998 Iowa Acts, chapter 1202, section 15(1), and rule 173.6(17A), that the presiding officer be an administrative law judge.

**641—173.6(17A) Presiding officer.**

**173.6(1)** Any party who wishes to request that the presiding officer assigned to render a proposed decision be an administrative law judge employed by the department of inspections and appeals must file a written request within 20 days after service of a notice of hearing which identifies or describes the presiding officer as the director of the department or members of the department.

**173.6(2)** The department may deny the request only upon a finding that one or more of the following apply:

a. Neither the department nor any officer of the department under whose authority the contested case is to take place is a named party to the proceeding or a real party in interest to that proceeding.

b. There is a compelling need to expedite issuance of a final decision in order to protect the public health, safety, or welfare.

c. An administrative law judge with the qualifications identified in subrule 173.6(4) is unavailable to hear the case within a reasonable time.

d. The case involves significant policy issues of first impression that are inextricably intertwined with the factual issues presented.

e. The demeanor of the witnesses is likely to be dispositive in resolving the disputed factual issues.

f. Funds are unavailable to pay the costs of an administrative law judge and an interagency appeal.

g. The request was not timely filed.

h. The request is not consistent with a specified statute.

**173.6(3)** The department shall issue a written ruling specifying the grounds for its decision within 20 days after a request for an administrative law judge is filed. If the ruling is contingent upon the availability of an administrative law judge with the qualifications identified in subrule 173.6(4), the parties shall be notified at least 10 days prior to hearing if a qualified administrative law judge will not be available.

**173.6(4)** An administrative law judge assigned to act as presiding officer in a contested case shall have the following technical expertise unless waived by the department: a J.D. degree.

**173.6(5)** Except as provided otherwise by another provision of law, all rulings by an administrative law judge acting as presiding officer are subject to appeal to the department. A party must seek any available intra-agency appeal in order to exhaust adequate administrative remedies.

**173.6(6)** Unless otherwise provided by law, the director of the department and members of multimember boards and commissions, when reviewing a proposed decision upon intra-agency appeal, shall have the powers of and shall comply with the provisions of this chapter which apply to presiding officers.

**641—173.7(17A) Waiver of procedures.** Unless otherwise precluded by law, the parties in a contested case proceeding may waive any provision of this chapter. However, the department in its discretion may refuse to give effect to such a waiver when it deems the waiver to be inconsistent with the public interest.

**641—173.8(17A) Telephone proceedings.** The presiding officer may resolve preliminary procedural motions by telephone conference in which all parties have an opportunity to participate. Other telephone proceedings may be held with the consent of all parties. The presiding officer will determine the location of the parties and witnesses for telephone hearings. The convenience of the witnesses or parties, as well as the nature of the case, will be considered when location is chosen.

**641—173.9(17A) Disqualification.**

**173.9(1)** A presiding officer or other person shall withdraw from participation in the making of any proposed or final decision in a contested case if that person:

a. Has a personal bias or prejudice concerning a party or a representative of a party;

b. Has personally investigated, prosecuted or advocated in connection with that case, the specific controversy underlying that case, another pending factually related contested case, or a pending factually related controversy that may culminate in a contested case involving the same parties;

c. Is subject to the authority, direction or discretion of any person who has personally investigated, prosecuted or advocated in connection with that contested case, the specific controversy underlying that contested case, or a pending factually related contested case or controversy involving the same parties;

d. Has acted as counsel to any person who is a private party to that proceeding within the past two years;

e. Has a personal financial interest in the outcome of the case or any other significant personal interest that could be substantially affected by the outcome of the case;

f. Has a spouse or relative within the third degree of relationship that (1) is a party to the case, or an officer, director or trustee of a party; (2) is a lawyer in the case; (3) is known to have an interest that could be substantially affected by the outcome of the case; or (4) is likely to be a material witness in the case; or

g. Has any other legally sufficient cause to withdraw from participation in the decision making in that case.

**173.9(2)** The term "personally investigated" means taking affirmative steps to interview witnesses directly or to obtain documents or other information directly. The term "personally investigated" does not include general direction and supervision of assigned investigators, unsolicited receipt of information which is relayed to assigned investigators, review of another person's investigative work product in the course of determining whether there is probable cause to initiate a proceeding, or exposure to factual information while performing other agency functions, including fact gathering for purposes other than investigation of the matter which culminates in a contested case. Factual information relevant to the merits of a contested case received by a person who later serves as presiding officer in that case shall be disclosed if required by Iowa Code section 17A.17 as amended by 1998 Iowa Acts, chapter 1202, section 19, and subrules 173.9(3) and 173.23(9).

**173.9(3)** In a situation where a presiding officer or other person knows of information which might reasonably be deemed to be a basis for disqualification and decides voluntary withdrawal is unnecessary, that person shall submit the

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relevant information for the record by affidavit and shall provide for the record a statement of the reasons for the determination that withdrawal is unnecessary.

**173.9(4)** If a party asserts disqualification on any appropriate ground, including those listed in subrule 173.9(1), the party shall file a motion supported by an affidavit pursuant to 1998 Iowa Acts, chapter 1202, section 19(7). The motion must be filed as soon as practicable after the reason alleged in the motion becomes known to the party.

If the presiding officer determines that disqualification is appropriate, the presiding officer or other person shall withdraw. If the presiding officer determines that withdrawal is not required, the presiding officer shall enter an order to that effect. A party asserting disqualification may seek an interlocutory appeal under rule 173.25(17A) and seek a stay under rule 173.29(17A).

**641—173.10(17A) Consolidation—severance.**

**173.10(1)** Consolidation. The presiding officer may consolidate any or all matters at issue in two or more contested case proceedings where (a) the matters at issue involve common parties or common questions of fact or law; (b) consolidation would expedite and simplify consideration of the issues involved; and (c) consolidation would not adversely affect the rights of any of the parties to those proceedings.

**173.10(2)** Severance. The presiding officer may, for good cause shown, order any contested case proceedings or portions thereof severed.

**641—173.11(17A) Pleadings.**

**173.11(1)** Pleadings may be required by rule, by the notice of hearing, or by order of the presiding officer.

**173.11(2)** Answer. An answer shall be filed within 20 days of service of the notice of hearing unless otherwise ordered. A party may move to dismiss or apply for a more definite and detailed statement when appropriate.

An answer shall show on whose behalf it is filed and specifically admit, deny, or otherwise answer all material allegations of the notice of hearing to which it responds. It shall state any facts deemed to show an affirmative defense and contain as many additional defenses as the pleader may claim.

An answer shall state the name, address and telephone number of the person filing the answer, the person or entity on whose behalf it is filed, and the attorney representing that person, if any.

Any allegation in the notice of hearing not denied in the answer is considered admitted. The presiding officer may refuse to consider any defense not raised in the answer which could have been raised on the basis of facts known when the answer was filed if any party would be prejudiced.

**173.11(3)** Amendment. Notices of hearing and answers may be amended with the consent of the parties or in the discretion of the presiding officer who may impose terms or grant a continuance.

**641—173.12(17A) Service and filing of pleadings and other papers.**

**173.12(1)** Service—when required. Except where otherwise provided by law, every document filed in a contested case proceeding shall be served upon each of the parties of record to the proceeding, including the person designated as prosecutor for the state or the department, simultaneously with their filing. Except for the original notice of hearing and an application for rehearing as provided in Iowa Code section 17A.16(2), the party filing a document is responsible for service on all parties.

**173.12(2)** Service—how made. Service upon a party represented by an attorney shall be made upon the attorney unless otherwise ordered. Service is made by delivery or by mailing a copy to the person's last-known address. Service by mail is complete upon mailing, except where otherwise specifically provided by statute, rule, or order.

**173.12(3)** Filing—when required. After the notice of hearing, all documents in a contested case proceeding shall be filed with the Department of Public Health, Lucas State Office Building, Des Moines, Iowa 50319-0075. All documents that are required to be served upon a party shall be filed simultaneously with the department.

**173.12(4)** Filing—when made. Except where otherwise provided by law, a document is deemed filed at the time it is delivered to the department, delivered to an established courier service for immediate delivery to that office, or mailed by first-class mail or state interoffice mail to that office, so long as there is proof of mailing.

**173.12(5)** Proof of mailing. Proof of mailing includes either: a legible United States Postal Service postmark on the envelope, a certificate of service, a notarized affidavit, or a certification in substantially the following form:

I certify under penalty of perjury and pursuant to the laws of Iowa that, on (date of mailing), I mailed copies of (describe document) addressed to the Department of Public Health, Lucas State Office Building, Des Moines, Iowa 50319-0075, and to the names and addresses of the parties listed below by depositing the same in (a United States post office mailbox with correct postage properly affixed or state interoffice mail).  
(Date) (Signature)

**641—173.13(17A) Discovery.**

**173.13(1)** Discovery procedures applicable in civil actions are applicable in contested cases. Unless lengthened or shortened by these rules or by order of the presiding officer, time periods for compliance with discovery shall be as provided in the Iowa Rules of Civil Procedure.

**173.13(2)** Any motion relating to discovery shall allege that the moving party has previously made a good-faith attempt to resolve the discovery issues involved with the opposing party. Motions in regard to discovery shall be ruled upon by the presiding officer. Opposing parties shall be afforded the opportunity to respond within ten days of the filing of the motion unless the time is shortened as provided in subrule 173.13(1). The presiding officer may rule on the basis of the written motion and any response, or may order argument on the motion.

**173.13(3)** Evidence obtained in discovery may be used in the contested case proceeding if that evidence would otherwise be admissible in that proceeding.

**641—173.14(17A) Subpoenas.****173.14(1) Issuance.**

a. An agency subpoena shall be issued to a party on request. Such a request must be in writing. In the absence of good cause for permitting later action, a request for a subpoena must be received at least three days before the scheduled hearing. The request shall include the name, address, and telephone number of the requesting party.

b. Except to the extent otherwise provided by law, parties are responsible for service of their own subpoenas and payment of witness fees and mileage expenses.

**173.14(2)** Motion to quash or modify. The presiding officer may quash or modify a subpoena for any lawful reason upon motion in accordance with the Iowa Rules of Civil Pro-

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cedure. A motion to quash or modify a subpoena shall be set for argument promptly.

**641—173.15(17A) Motions.**

**173.15(1)** No technical form for motions is required. However, prehearing motions must be in writing, state the grounds for relief, and state the relief sought.

**173.15(2)** Any party may file a written response to a motion within ten days after the motion is served. The presiding officer may consider a failure to respond within the required time period in ruling on a motion.

**173.15(3)** The presiding officer may schedule oral argument on any motion.

**173.15(4)** Motions pertaining to the hearing, except motions for summary judgment, must be filed and served at least ten days prior to the date of hearing unless there is good cause for permitting later action or the time for such action is lengthened or shortened by an order of the presiding officer.

**173.15(5)** Motions for summary judgment. Motions for summary judgment shall comply with the requirements of Iowa Rule of Civil Procedure 237 and shall be subject to disposition according to the requirements of that rule to the extent such requirements are not inconsistent with the provisions of this rule or any other provision of law governing the procedure in contested cases.

Motions for summary judgment must be filed and served at least 45 days prior to the scheduled hearing date, or other time period determined by the presiding officer. Any party resisting the motion shall file and serve a resistance within 15 days, unless otherwise ordered by the presiding officer, from the date a copy of the motion was served. The time fixed for hearing or nonoral submission shall be not less than 20 days after the filing of the motion, unless a shorter time is ordered by the presiding officer. A summary judgment order rendered on all issues in a contested case is subject to rehearing pursuant to 173.28(17A) and appeal pursuant to 173.27(17A).

**641—173.16(17A) Prehearing conference.**

**173.16(1)** Any party may request a prehearing conference. A written request for prehearing conference or an order for prehearing conference on the presiding officer's own motion shall be filed not less than seven days prior to the hearing date. A prehearing conference shall be scheduled not less than three business days prior to the hearing date.

Written notice of the prehearing conference shall be given by the presiding officer to all parties. For good cause the presiding officer may permit variances from this rule.

**173.16(2)** Each party shall bring to the prehearing conference:

a. A final list of the witnesses who the party anticipates will testify at hearing. Witnesses not listed may be excluded from testifying unless there was good cause for the failure to include their names; and

b. A final list of exhibits which the party anticipates will be introduced at hearing. Exhibits other than rebuttal exhibits that are not listed may be excluded from admission into evidence unless there was good cause for the failure to include them.

c. Witness or exhibit lists may be amended subsequent to the prehearing conference within the time limits established by the presiding officer at the prehearing conference. Any such amendments must be served on all parties.

**173.16(3)** In addition to the requirements of subrule 173.16(2), the parties at a prehearing conference may:

a. Enter into stipulations of law or fact;

b. Enter into stipulations on the admissibility of exhibits;

c. Identify matters which the parties intend to request be officially noticed;

d. Enter into stipulations for waiver of any provision of law; and

e. Consider any additional matters which will expedite the hearing.

**173.16(4)** Prehearing conferences shall be conducted by telephone unless otherwise ordered. Parties shall exchange and receive witness and exhibit lists in advance of a telephone prehearing conference.

**641—173.17(17A) Continuances.** Applications for continuances shall be made to the presiding officer.

**173.17(1)** A written application for a continuance shall:

a. Be made at the earliest possible time and no less than seven days before the hearing except in case of unanticipated emergencies;

b. State the specific reasons for the request; and

c. Be signed by the requesting party or the party's representative.

**173.17(2)** In determining whether to grant a continuance, the presiding officer may consider:

a. Prior continuances;

b. The interests of all parties;

c. The likelihood of informal settlement;

d. The existence of an emergency;

e. Any objection;

f. Any applicable time requirements;

g. The existence of a conflict in the schedules of counsel, parties, or witnesses;

h. The timeliness of the request; and

i. Other relevant factors.

The presiding officer may require documentation of any grounds for continuance.

**641—173.18(17A) Withdrawals.** A party requesting a contested case proceeding may withdraw that request prior to the hearing only in accordance with department rules. Unless otherwise provided, a withdrawal shall be with prejudice.

**641—173.19(17A) Intervention.**

**173.19(1)** Motion. A motion for leave to intervene in a contested case proceeding shall state the grounds for the proposed intervention, the position and interest of the proposed intervenor, and the possible impact of intervention on the proceeding. A proposed answer or petition in intervention shall be attached to the motion. Any party may file a response within 14 days of service of the motion to intervene unless the time period is extended or shortened by the presiding officer.

**173.19(2)** When filed. Motion for leave to intervene shall be filed as early in the proceeding as possible to avoid adverse impact on existing parties or the conduct of the proceeding. Unless otherwise ordered, a motion for leave to intervene shall be filed before the prehearing conference, if any, or at least 20 days before the date scheduled for hearing. Any later motion must contain a statement of good cause for the failure to file in a timely manner. Unless inequitable or unjust, an intervenor shall be bound by any agreement, arrangement, or other matter previously raised in the case. Requests by untimely intervenors for continuances which would delay the proceeding will ordinarily be denied.

**173.19(3)** Grounds for intervention. The movant shall demonstrate that (a) intervention would not unduly prolong the proceedings or otherwise prejudice the rights of existing parties; (b) the movant is likely to be aggrieved or adversely

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affected by a final order in the proceeding; and (c) the interests of the movant are not adequately represented by existing parties.

**173.19(4)** Effect of intervention. If appropriate, the presiding officer may order consolidation of the petitions and briefs of different parties whose interests are aligned with each other and limit the number of representatives allowed to participate actively in the proceedings. A person granted leave to intervene is a party to the proceeding. The order granting intervention may restrict the issues that may be raised by the intervenor or otherwise condition the intervenor's participation in the proceeding.

**641—173.20(17A) Hearing procedures.**

**173.20(1)** The presiding officer presides at the hearing, and may rule on motions, require briefs, issue a proposed decision, and issue such orders and rulings as will ensure the orderly conduct of the proceedings.

**173.20(2)** All objections shall be timely made and stated on the record.

**173.20(3)** Parties have the right to participate or to be represented in all hearings or prehearing conferences related to their case. Partnerships, corporations, or associations may be represented by any member, officer, director, or duly authorized agent. Any party may be represented by an attorney or another person authorized by law.

**173.20(4)** Subject to terms and conditions prescribed by the presiding officer, parties have the right to introduce evidence on issues of material fact, cross-examine witnesses present at the hearing as necessary for a full and true disclosure of the facts, present evidence in rebuttal, and submit briefs and engage in oral argument.

**173.20(5)** The presiding officer shall maintain the decorum of the hearing and may refuse to admit or may expel anyone whose conduct is disorderly.

**173.20(6)** Witnesses may be sequestered during the hearing.

**173.20(7)** The presiding officer shall conduct the hearing in the following manner:

- a. The presiding officer shall give an opening statement briefly describing the nature of the proceedings;
- b. The parties shall be given an opportunity to present opening statements;
- c. Parties shall present their cases in the sequence determined by the presiding officer;
- d. Each witness shall be sworn or affirmed by the presiding officer or the court reporter, and be subject to examination and cross-examination. The presiding officer may limit questioning in a manner consistent with law;
- e. When all parties and witnesses have been heard, parties may be given the opportunity to present final arguments.

**641—173.21(17A) Evidence.**

**173.21(1)** The presiding officer shall rule on admissibility of evidence and may, where appropriate, take official notice of facts in accordance with all applicable requirements of law.

**173.21(2)** Stipulation of facts is encouraged. The presiding officer may make a decision based on stipulated facts.

**173.21(3)** Evidence in the proceeding shall be confined to the issues as to which the parties received notice prior to the hearing unless the parties waive their right to such notice or the presiding officer determines that good cause justifies expansion of the issues. If the presiding officer decides to admit evidence on issues outside the scope of the notice over the objection of a party who did not have actual notice of those issues, that party, upon timely request, shall receive a

continuance sufficient to amend pleadings and to prepare on the additional issue.

**173.21(4)** The party seeking admission of an exhibit must provide opposing parties with an opportunity to examine the exhibit prior to the ruling on its admissibility. Copies of documents should normally be provided to opposing parties.

All exhibits admitted into evidence shall be appropriately marked and be made part of the record.

**173.21(5)** Any party may object to specific evidence or may request limits on the scope of any examination or cross-examination. Such an objection shall be accompanied by a brief statement of the grounds upon which it is based. The objection, the ruling on the objection, and the reasons for the ruling shall be noted in the record. The presiding officer may rule on the objection at the time it is made or may reserve a ruling until the written decision.

**173.21(6)** Whenever evidence is ruled inadmissible, the party offering that evidence may submit an offer of proof on the record. The party making the offer of proof for excluded oral testimony shall briefly summarize the testimony or, with permission of the presiding officer, present the testimony. If the excluded evidence consists of a document or exhibit, it shall be marked as part of an offer of proof and inserted in the record.

**641—173.22(17A) Default.**

**173.22(1)** If a party fails to appear or participate in a contested case proceeding after proper service of notice, the presiding officer may, if no adjournment is granted, enter a default decision or proceed with the hearing and render a decision in the absence of the party.

**173.22(2)** Where appropriate and not contrary to law, any party may move for default against a party who has requested the contested case proceeding and has failed to file a required pleading or has failed to appear after proper service.

**173.22(3)** Default decisions or decisions rendered on the merits after a party has failed to appear or participate in a contested case proceeding become final agency action unless, within 15 days after the date of notification or mailing of the decision, a motion to vacate is filed and served on all parties or an appeal of a decision on the merits is timely initiated within the time provided by rule 173.27(17A). A motion to vacate must state all facts relied upon by the moving party which establish that good cause existed for that party's failure to appear or participate at the contested case proceeding. Each fact so stated must be substantiated by at least one sworn affidavit of a person with personal knowledge of each such fact, which affidavit(s) must be attached to the motion.

**173.22(4)** The time for further appeal of a decision for which a timely motion to vacate has been filed is stayed pending a decision on the motion to vacate.

**173.22(5)** Properly substantiated and timely filed motions to vacate shall be granted only for good cause shown. The burden of proof as to good cause is on the moving party. Adverse parties shall have ten days to respond to a motion to vacate. Adverse parties shall be allowed to conduct discovery as to the issue of good cause and to present evidence on the issue prior to a decision on the motion, if a request to do so is included in that party's response.

**173.22(6)** "Good cause" for purposes of this rule shall have the same meaning as "good cause" for setting aside a default judgment under Iowa Rule of Civil Procedure 236.

**173.22(7)** A decision denying a motion to vacate is subject to further appeal within the time limit allowed for further appeal of a decision on the merits in the contested case proceeding. A decision granting a motion to vacate is subject to

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interlocutory appeal by the adverse party pursuant to rule 173.25(17A).

**173.22(8)** If a motion to vacate is granted and no timely interlocutory appeal has been taken, the presiding officer shall issue another notice of hearing and the contested case shall proceed accordingly.

**173.22(9)** A default decision may award any relief consistent with the request for relief made in the petition and embraced in its issues (but, unless the defaulting party has appeared, it cannot exceed the relief demanded).

**173.22(10)** A default decision may provide either that the default decision is to be stayed pending a timely motion to vacate or that the default decision is to take effect immediately, subject to a request for stay under rule 173.29(17A).

**641—173.23(17A) Ex parte communication.**

**173.23(1)** Prohibited communications. Unless required for the disposition of ex parte matters specifically authorized by statute, following issuance of the notice of hearing, there shall be no communication, directly or indirectly, between the presiding officer and any party or representative of any party or any other person with a direct or indirect interest in such case in connection with any issue of fact or law in the case except upon notice and opportunity for all parties to participate. This does not prohibit persons jointly assigned such tasks from communicating with each other. Nothing in this provision is intended to preclude the presiding officer from communicating with members of the department or seeking the advice or help of persons other than those with a personal interest in, or those engaged in personally investigating as defined in subrule 173.9(2), prosecuting, or advocating in, either the case under consideration or a pending factually related case involving the same parties as long as those persons do not directly or indirectly communicate to the presiding officer any ex parte communications they have received of a type that the presiding officer would be prohibited from receiving or that furnish, augment, diminish, or modify the evidence in the record.

**173.23(2)** Prohibitions on ex parte communications commence with the issuance of the notice of hearing in a contested case and continue for as long as the case is pending.

**173.23(3)** Written, oral or other forms of communication are "ex parte" if made without notice and opportunity for all parties to participate.

**173.23(4)** To avoid prohibited ex parte communications, notice must be given in a manner reasonably calculated to give all parties a fair opportunity to participate. Notice of written communications shall be provided in compliance with rule 173.12(17A) and may be supplemented by telephone, facsimile, electronic mail or other means of notification. Where permitted, oral communications may be initiated through conference telephone call including all parties or their representatives.

**173.23(5)** Persons who jointly act as presiding officer in a pending contested case may communicate with each other without notice or opportunity for parties to participate.

**173.23(6)** The division director or other persons may be present in deliberations or otherwise advise the presiding officer without notice or opportunity for parties to participate as long as they are not disqualified from participating in the making of a proposed or final decision under any provision of law and they comply with subrule 173.23(1).

**173.23(7)** Communications with the presiding officer involving uncontested scheduling or procedural matters do not require notice or opportunity for parties to participate. Parties should notify other parties prior to initiating such contact

with the presiding officer when feasible, and shall notify other parties when seeking to continue hearings or other deadlines pursuant to rule 173.17(17A).

**173.23(8)** Disclosure of prohibited communications. A presiding officer who receives a prohibited ex parte communication during the pendency of a contested case must initially determine if the effect of the communication is so prejudicial that the presiding officer should be disqualified. If the presiding officer determines that disqualification is warranted, a copy of any prohibited written communication, all written responses to the communication, a written summary stating the substance of any prohibited oral or other communication not available in written form for disclosure, all responses made, and the identity of each person from whom the presiding officer received a prohibited ex parte communication shall be submitted for inclusion in the record under seal by protective order (or disclosed). If the presiding officer determines that disqualification is not warranted, such documents shall be submitted for inclusion in the record and served on all parties. Any party desiring to rebut the prohibited communication must be allowed the opportunity to do so upon written request filed within ten days after notice of the communication.

**173.23(9)** Promptly after being assigned to serve as presiding officer at any stage in a contested case proceeding, a presiding officer shall disclose to all parties material factual information received through ex parte communication prior to such assignment unless the factual information has already been or shortly will be disclosed pursuant to Iowa Code section 17A.13(2) or through discovery. Factual information contained in an investigative report or similar document need not be separately disclosed by the presiding officer as long as such documents have been or will shortly be provided to the parties.

**173.23(10)** The presiding officer may render a proposed or final decision imposing appropriate sanctions for violations of this rule including default, a decision against the offending party, censure, or suspension or revocation of the privilege to practice before the department. Violation of ex parte communication prohibitions by department personnel shall be reported to the director for possible sanctions including censure, suspension, dismissal, or other disciplinary action.

**641—173.24(17A) Recording costs.** Upon request, the department shall provide a copy of the whole or any portion of the record at cost. The cost of preparing a copy of the record or of transcribing the hearing record shall be paid by the requesting party. Parties who request that a hearing be recorded by certified shorthand reporters rather than by electronic means shall bear the cost of that recordation, unless otherwise provided by law.

**641—173.25(17A) Interlocutory appeals.** Upon written request of a party or on its own motion, the director or board or commission may review an interlocutory order of the presiding officer. In determining whether to do so, the director or board or commission shall weigh the extent to which its granting the interlocutory appeal would expedite final resolution of the case and the extent to which review of that interlocutory order by the department at the time it reviews the proposed decision of the presiding officer would provide an adequate remedy. Any request for interlocutory review must be filed within 14 days of issuance of the challenged order, but no later than the time for compliance with the order or the date of hearing, whichever is first.

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**641—173.26(17A) Final decision.**

**173.26(1)** When the director of the department presides over the reception of evidence at the hearing, its decision is a final decision.

**173.26(2)** When the director of the department does not preside at the reception of evidence, the presiding officer shall make a proposed decision. The proposed decision becomes the final decision of the department without further proceedings unless there is an appeal to, or review on motion of, the department within the time provided in rule 173.27(17A).

**641—173.27(17A) Appeals and review.**

**173.27(1)** Appeal by party. Any adversely affected party may appeal a proposed decision to the director within 30 days after issuance of the proposed decision.

**173.27(2)** Review. The director may initiate review of a proposed decision on its own motion at any time within 30 days following the issuance of such a decision.

**173.27(3)** Notice of appeal. An appeal of a proposed decision is initiated by filing a timely notice of appeal with the department. The notice of appeal must be signed by the appealing party or a representative of that party and contain a certificate of service. The notice shall specify:

- a. The parties initiating the appeal;
- b. The proposed decision or order appealed from;
- c. The specific findings or conclusions to which exception is taken and any other exceptions to the decision or order;
- d. The relief sought;
- e. The grounds for relief.

**173.27(4)** Requests to present additional evidence. A party may request the taking of additional evidence only by establishing that the evidence is material, that good cause existed for the failure to present the evidence at the hearing, and that the party has not waived the right to present the evidence. A written request to present additional evidence must be filed with the notice of appeal or, by a nonappealing party, within 14 days of service of the notice of appeal. The director may remand a case to the presiding officer for further hearing or may itself preside at the taking of additional evidence.

**173.27(5)** Scheduling. The department shall issue a schedule for consideration of the appeal.

**173.27(6)** Briefs and arguments. Unless otherwise ordered, within 20 days of the notice of appeal or order for review, each appealing party may file exceptions and briefs. Within 20 days thereafter, any party may file a responsive brief. Briefs shall cite any applicable legal authority and specify relevant portions of the record in that proceeding. Written requests to present oral argument shall be filed with the briefs.

The director may resolve the appeal on the briefs or provide an opportunity for oral argument. The director may shorten or extend the briefing period as appropriate.

**641—173.28(17A) Applications for rehearing.**

**173.28(1)** By whom filed. Any party to a contested case proceeding may file an application for rehearing from a final order.

**173.28(2)** Content of application. The application for rehearing shall state on whose behalf it is filed, the specific grounds for rehearing, and the relief sought. In addition, the application shall state whether the applicant desires reconsideration of all or part of the department decision on the existing record and whether, on the basis of the grounds enu-

merated in subrule 173.27(4), the applicant requests an opportunity to submit additional evidence.

**173.28(3)** Time of filing. The application shall be filed with the department within 20 days after issuance of the final decision.

**173.28(4)** Notice to other parties. A copy of the application shall be timely mailed by the applicant to all parties of record not joining therein. If the application does not contain a certificate of service, the department shall serve copies on all parties.

**173.28(5)** Disposition. Any application for a rehearing shall be deemed denied unless the department grants the application within 20 days after its filing.

**641—173.29(17A) Stays of department actions.**

**173.29(1)** When available.

a. Any party to a contested case proceeding may petition the department for a stay of an order issued in that proceeding or for other temporary remedies, pending review by the department. The petition shall be filed with the notice of appeal and shall state the reasons justifying a stay or other temporary remedy. The director may rule on the stay or authorize the presiding officer to do so.

b. Any party to a contested case proceeding may petition the department for a stay or other temporary remedies pending judicial review of all or part of that proceeding. The petition shall state the reasons justifying a stay or other temporary remedy.

**173.29(2)** When granted. In determining whether to grant a stay, the presiding officer or the board, commission, or director, as appropriate, shall consider the factors listed in 1998 Iowa Acts, chapter 1202, section 23(5c).

**173.29(3)** Vacation. A stay may be vacated by the issuing authority upon application of the department or any other party.

**641—173.30(17A) No factual dispute contested cases.** If the parties agree that no dispute of material fact exists as to a matter that would be a contested case if such a dispute of fact existed, the parties may present all relevant admissible evidence either by stipulation or otherwise as agreed by the parties, without necessity for the production of evidence at an evidentiary hearing. If such agreement is reached, a jointly submitted schedule detailing the method and timetable for submission of the record, briefs and oral argument should be submitted to the presiding officer for approval as soon as practicable. If the parties cannot agree, any party may file and serve a motion for summary judgment pursuant to the rules governing such motions.

**641—173.31(17A) Emergency adjudicative proceedings.**

**173.31(1)** Necessary emergency action. To the extent necessary to prevent or avoid immediate danger to the public health, safety, or welfare and, consistent with the Constitution and other provisions of law, the department may issue a written order in compliance with Iowa Code section 17A.18 to suspend a license in whole or in part, order the cessation of any continuing activity, order affirmative action, or take other action within the jurisdiction of the department by emergency adjudicative order. Before issuing an emergency adjudicative order the department shall consider factors including, but not limited to, the following:

a. Whether there has been a sufficient factual investigation to ensure that the department is proceeding on the basis of reliable information;

b. Whether the specific circumstances which pose immediate danger to the public health, safety or welfare have been identified and determined to be continuing;

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c. Whether the person required to comply with the emergency adjudicative order may continue to engage in other activities without posing immediate danger to the public health, safety or welfare;

d. Whether imposition of monitoring requirements or other interim safeguards would be sufficient to protect the public health, safety or welfare; and

e. Whether the specific action contemplated by the department is necessary to avoid the immediate danger.

**173.31(2) Issuance of order.**

a. An emergency adjudicative order shall contain findings of fact, conclusions of law, and policy reasons to justify the determination of an immediate danger in the department's decision to take immediate action.

b. The written emergency adjudicative order shall be immediately delivered to persons who are required to comply with the order by utilizing one or more of the following procedures:

(1) Personal delivery;

(2) Certified mail, return receipt requested, to the last address on file with the department;

(3) Certified mail to the last address on file with the department;

(4) First-class mail to the last address on file with the department; or

(5) Fax. Fax may be used as the sole method of delivery if the person required to comply with the order has filed a written request that department orders be sent by fax and has provided a fax number for that purpose.

c. To the degree practicable, the department shall select the procedure for providing written notice that best ensures prompt, reliable delivery.

**173.31(3) Oral notice.** Unless the written emergency adjudicative order is provided by personal delivery on the same day that the order issues, the department shall make reasonable immediate efforts to contact by telephone the persons who are required to comply with the order.

**173.31(4) Completion of proceedings.** After the issuance of an emergency adjudicative order, the department shall proceed as quickly as feasible to complete any proceedings that would be required if the matter did not involve an immediate danger.

Issuance of a written emergency adjudicative order shall include notification of the date on which department proceedings are scheduled for completion. After issuance of an emergency adjudicative order, continuance of further department proceedings to a later date will be granted only in compelling circumstances upon application in writing.

These rules are intended to implement Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202.

**ARC 8851A****PUBLIC HEALTH  
DEPARTMENT[641]****Notice of Intended Action**

Twenty-five interested persons, a governmental subdivision, an agency or association of 25 or more persons may demand an oral presentation hereon as provided in Iowa Code section 17A.4(1)"b."

Notice is also given to the public that the Administrative Rules Review Committee may, on its own motion or on written request by any individual or group, review this proposed action under section 17A.8(6) at a regular or special meeting where the public or interested persons may be heard.

Pursuant to the authority of Iowa Code section 135.11, the Department of Public Health hereby gives Notice of In-

tended Action to adopt Chapter 195, "Student Loan Default/Noncompliance with Agreement for Payment of Obligation," Iowa Administrative Code.

The proposed rules establish procedures for the denial of issuance or renewal, suspension or revocation of a license upon receipt of a certificate of noncompliance from the College Student Aid Commission according to the procedures set forth in Iowa Code sections 261.121 to 261.127.

Any interested person may make written suggestions or comments on or before April 13, 1999. Such written comments should be addressed to Jennifer Hart, Bureau of Public Affairs, Department of Public Health, Lucas State Office Building, Des Moines, Iowa 50319-0075. Persons who wish to convey their views orally should contact Jennifer Hart at (515)281-7701 or at the department's address noted above.

These rules are intended to implement Iowa Code chapter 261.

The following new chapter is proposed.

**CHAPTER 195****STUDENT LOAN DEFAULT/NONCOMPLIANCE  
WITH AGREEMENT FOR PAYMENT OF  
OBLIGATION**

**641—195.1(261) General definitions.** For the purposes of this chapter, the following definitions shall apply:

"Certificate of noncompliance" means written certification from the college student aid commission to the licensing authority certifying that the licensee has defaulted on an obligation owed to or collected by the commission.

"Commission" means the college student aid commission.

"Department" means the department of public health.

"Licensing authority" means the department or board.

**641—195.2(261) Issuance or renewal of a license—denial.** The department or board shall deny the issuance or renewal of a license upon receipt of a certificate of noncompliance from the college student aid commission according to the procedures set forth in Iowa Code sections 261.121 to 261.127.

**195.2(1)** In order to process the certificate of noncompliance received by the department or board, the department or board will maintain records of licensees by name, current known address, and social security number.

**195.2(2)** Upon receipt of a certificate of noncompliance duly issued by the commission, the department or board shall initiate procedures for denial of issuance or renewal of license.

**195.2(3)** The department or board shall provide notice to the licensee or applicant informing that person of the board's intent to deny the license and said notice shall be served by restricted certified mail, return receipt requested, or by personal service in accordance with the Iowa Rules of Civil Procedure. The notice shall state all of the following:

a. The licensing authority intends to deny issuance or renewal of an individual's license due to the receipt of a certificate of noncompliance from the commission.

b. The individual must contact the commission to schedule a conference or to otherwise obtain a withdrawal of a certificate of noncompliance.

c. Unless the commission furnishes a withdrawal of a certificate of noncompliance to the licensing authority within 30 days of the issuance of the notice under this subrule, the individual's license shall be denied.

**195.2(4)** The applicant or licensee served with a notice under 195.2(3) above shall not have a right to a hearing be-

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fore the board but may request a court hearing pursuant to Iowa Code section 261.127. Such court hearing must be requested within 30 days of the provision of notice.

**195.2(5)** The effective date of the denial of the issuance or renewal of a license, as specified in the notice required by Iowa Code section 261.126, shall be 60 days following service of the notice upon the applicant or licensee.

**195.2(6)** The department's or board's administrator is authorized to prepare and serve the notice required by Iowa Code section 261.126 upon the applicant or licensee.

**195.2(7)** All department or board fees required for application, license renewal, or license reinstatement must be paid by applicants or licensees and all continuing education requirements must be met before a license will be issued, renewed, or reinstated after the department or board has denied the issuance or renewal of a license pursuant to Iowa Code chapter 261.

**195.2(8)** In the event an applicant or licensee timely files a district court action following service of a department or board notice pursuant to Iowa Code section 261.126, the department or board shall continue with the intended action described in the notice upon the receipt of a court order lifting the stay, dismissing the action, or otherwise directing the department or board to proceed.

**195.2(9)** Upon the filing of a district court action, the applicant or licensee shall promptly file a copy of the petition filed with the district court with the department or board. In addition, the applicant or licensee shall provide the department or board with copies of all court orders and rulings entered in such action within seven days of the action.

**195.2(10)** For purposes of determining the effective date of the denial of the issuance or renewal of a license, the department or board shall count the number of days before the action was filed and the number of days after the action was disposed of by the court.

**641—195.3(261) Suspension or revocation of a license.** The department or board shall suspend or revoke a license upon receipt of a certificate of noncompliance from the college student aid commission according to the procedures set forth in Iowa Code sections 261.121 to 261.127. In addition to the provisions contained in those sections, the following shall apply:

**195.3(1)** In order to process the certificate of noncompliance received by the department or board, the board or department will maintain records of licensees by name, current known address, and social security number.

**195.3(2)** Upon receipt of a certificate of noncompliance duly issued by the commission, the board shall initiate procedures for suspension or revocation of licensure.

**195.3(3)** The board shall provide notice to the licensee informing that person of the board's intent to suspend or revoke the license and said notice shall be served by restricted certified mail, return receipt requested, or by personal service in accordance with the Iowa Rules of Civil Procedure. The notice shall state all of the following:

a. The licensing authority intends to suspend or revoke an individual's license due to the receipt of a certificate of noncompliance from the commission.

b. The individual must contact the commission to schedule a conference or to otherwise obtain a withdrawal of a certificate of noncompliance.

c. Unless the commission furnishes a withdrawal of a certificate of noncompliance to the licensing authority within 30 days of the issuance of the notice under this subrule, the individual's license shall be suspended or revoked.

**195.3(4)** The licensee served with a notice under 195.3(3) above shall not have a right to a hearing before the board but may request a court hearing pursuant to Iowa Code section 261.127. Such court hearing must be requested within 30 days of the provision of notice.

**195.3(5)** The effective date of the suspension or revocation of a license, as specified in the notice required by Iowa Code section 261.126, shall be 60 days following service of the notice upon the licensee.

**195.3(6)** The department's or board's administrator is authorized to prepare and serve the notice required by Iowa Code section 261.126 upon the licensee.

**195.3(7)** All department or board fees required for application, license renewal, or license reinstatement must be paid by applicants or licensees and all continuing education requirements must be met before a license will be issued, renewed, or reinstated after the department or board has suspended or revoked a license pursuant to Iowa Code chapter 261.

**195.3(8)** In the event a licensee timely files a district court action following service of a department or board notice pursuant to Iowa Code section 261.126, the department or board shall continue with the intended action described in the notice upon the receipt of a court order lifting the stay, dismissing the action, or otherwise directing the department or board to proceed.

**195.3(9)** Upon the filing of a district court action, the licensee shall promptly file a copy of the petition filed with the district court with the department or board. In addition, the licensee shall provide the department or board with copies of all court orders and rulings entered in such action within seven days of the action.

**195.3(10)** For purposes of determining the effective date of the suspension or revocation, the department or board shall count the number of days before the action was filed and the number of days after the action was disposed of by the court.

**641—195.4(17A,22,261) Sharing of information.** Notwithstanding any statutory confidentiality provision, the department or board may share information with the commission for the sole purpose of identifying applicants or licensees subject to enforcement under Iowa Code chapter 261.

These rules are intended to implement Iowa Code chapter 261.

**ARC 8796A**

**PUBLIC SAFETY  
DEPARTMENT[661]**

**Notice of Intended Action**

Twenty-five interested persons, a governmental subdivision, an agency or association of 25 or more persons may demand an oral presentation hereon as provided in Iowa Code section 17A.4(1)"b."

Notice is also given to the public that the Administrative Rules Review Committee may, on its own motion or on written request by any individual or group, review this proposed action under section 17A.8(6) at a regular or special meeting where the public or interested persons may be heard.

Pursuant to the authority of Iowa Code sections 17A.3 and 321.4, the Department of Public Safety hereby gives Notice of Intended Action to amend Chapter 7, "Devices and Methods to Test Body Fluids for Alcohol or Drug Content," Iowa Administrative Code.

## PUBLIC SAFETY DEPARTMENT[661](cont'd)

Iowa Code sections 321J.11 and 321J.15 provide that devices approved by the Commissioner of Public Safety are required for collecting samples of breath of suspected drunk drivers. Standards for devices used to collect samples of breath for evidentiary testing are specified in 661—7.2(321J). Subrule 7.2(3) specifies certain devices which meet the standards and are in use in Iowa. The amendment proposed here updates that list by striking three devices no longer in use and adding a new device, the Datamaster cdm, a product of National Patents Analytical System, Inc. One device on the current list, the Intoxilyzer 4011A, made by CMI, Inc., also continues to be used for conducting evidentiary breath tests in Iowa.

A public hearing on this proposed amendment will be held on April 19, 1999, at 9:30 a.m. in the Third Floor Conference Room (west half) of the Wallace State Office Building, 900 East Grand, Des Moines, Iowa 50319. Persons may present their views orally or in writing at the public hearing. Persons who wish to make oral presentations at the public hearing should contact the Plans and Research Bureau, Iowa Department of Public Safety, Wallace State Office Building, Des Moines, Iowa 50319, by mail, by telephone at (515)281-5524, or by electronic mail to admrule@dps.state.ia.us, at least one day prior to the public hearing. Any written comments or information regarding this proposed rule may be directed to the Plans and Research Bureau by mail or electronic mail at the addresses indicated at least one day prior to the public hearing, or submitted at the public hearing. Persons who wish to convey their views orally other than at the public hearing may contact the Plans and Research Bureau by telephone or in person at the Bureau office at least one day prior to the public hearing.

The following amendment is proposed:

Amend subrule 7.2(3) as follows:

**7.2(3)** Although any breath testing device that meets the minimum performance requirements established by the National Highway Traffic Safety Administration, and cited in subrule 7.2(1), is authorized by the commissioner to be employed or to be caused to be used to determine the alcohol concentration, the following devices are being used in Iowa and meet those standards:

- a. ~~Intoxilyzer Model 4011A-CMI, Inc., Minturn, Colorado;~~
- b. ~~Mark IV Gas Chromatograph-Intoximeters, Inc., St. Louis, Missouri; Datamaster cdm, National Patents Analytical Systems, Inc.~~
- c. ~~Mark IVA Gas Chromatograph-Intoximeters, Inc., St. Louis, Missouri;~~
- d. ~~Mark II Gas Chromatograph-Intoximeters, Inc., St. Louis, Missouri;~~
- e. ~~Breathalyzer Model 1000-Smith & Wesson Electronics, Co., Eatontown, New Jersey.~~

ARC 8855A

PUBLIC SAFETY  
DEPARTMENT[661]

## Notice of Intended Action

Twenty-five interested persons, a governmental subdivision, an agency or association of 25 or more persons may demand an oral presentation hereon as provided in Iowa Code section 17A.4(1)"b."

Notice is also given to the public that the Administrative Rules Review Committee may, on its own motion or on written request by any individual or group, review this proposed action under section 17A.8(6) at a regular or special meeting where the public or interested persons may be heard.

Pursuant to the authority of Iowa Code sections 17A.3 and 321.4, the Department of Public Safety hereby gives Notice of Intended Action to rescind Chapter 10, "Practice and Procedure Before the Department of Public Safety," Iowa Administrative Code, and adopt a new chapter with the same title.

Responsibility for various administrative procedures outlined in Iowa Code chapter 17A is assigned to each executive branch agency within state government. To guide the execution of these responsibilities, Uniform Rules on Agency Procedure governing administrative procedures before state agencies have been developed. In this Notice of Intended Action, the Department of Public Safety is proposing to rescind Chapter 10 and adopt a new chapter of uniform rules to reflect significant changes to fit the department's particular circumstances. This chapter had been in need of substantial updating to meet the requirements of Iowa Code chapter 17A as amended in 1998 Iowa Acts, chapter 1202 [House File 667], which take effect on July 1, 1999. The Department is proposing to adopt the new chapter in order to update its procedures in compliance with the new language of the Iowa Administrative Procedure Act.

A public hearing on these proposed rules will be held on April 19, 1999, at 9 a.m. in the Third Floor Conference Room (west half), Wallace State Office Building, 900 East Grand, Des Moines, Iowa 50319. Persons may present their views orally or in writing at the public hearing. Persons who wish to make oral presentations at the public hearing should contact the Plans and Research Bureau, Department of Public Safety, Wallace State Office Building, Des Moines, Iowa 50319, by mail, by telephone at (515) 281-5524, or by E-mail to admrule@dps.state.ia.us, at least one day prior to the public hearing.

Any written comments or information regarding these proposed rules may be directed to the Plans and Research Bureau by mail or electronic mail at the addresses indicated at least one day prior to the public hearing, or submitted at the public hearing. Persons who wish to convey their views orally other than at the public hearing may contact the Plans and Research Bureau by telephone or in person at the Bureau office at least one day prior to the public hearing.

These rules are intended to implement Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202.

The following rules are proposed.

Rescind 661—Chapter 10 and adopt in lieu thereof the following new chapter:

CHAPTER 10  
PRACTICE AND PROCEDURE BEFORE THE  
DEPARTMENT OF PUBLIC SAFETY

661—10.1 to 10.100 Reserved.

PUBLIC SAFETY DEPARTMENT[661](cont'd)

DECLARATORY ORDERS

661—10.101(17A) Petition for declaratory order. Any person may file a petition with the department for a declaratory order as to the applicability to specified circumstances of a statute, rule, or order within the primary jurisdiction of the department of public safety, at the Administrative Services Division, Department of Public Safety, Wallace State Office Building, Des Moines, Iowa 50319. A petition is deemed filed when it is received by that office. The department shall provide the petitioner with a file-stamped copy of the petition if the petitioner provides the agency an extra copy for this purpose. The petition must be typewritten or legibly handwritten in ink and must substantially conform to the following form:

DEPARTMENT OF PUBLIC SAFETY

Petition by (Name of Petitioner) for a Declaratory Order on (Cite provisions of law involved). } PETITION FOR DECLARATORY ORDER

The petition must provide the following information:

- 1. A clear and concise statement of all relevant facts on which the order is requested.
2. A citation and the relevant language of the specific statutes, rules, policies, decisions, or orders, whose applicability is questioned, and any other relevant law.
3. The questions petitioner wants answered, stated clearly and concisely.
4. The answers to the questions desired by the petitioner and a summary of the reasons urged by the petitioner in support of those answers.
5. The reasons for requesting the declaratory order and disclosure of the petitioner's interest in the outcome.
6. A statement indicating whether the petitioner is currently a party to another proceeding involving the questions at issue and whether, to the petitioner's knowledge, those questions have been decided by, are pending determination by, or are under investigation by, any governmental entity.
7. The names and addresses of other persons, or a description of any class of persons, known by petitioner to be affected by, or interested in, the questions presented in the petition.
8. Any request by petitioner for a meeting provided for by 10.107(17A).

The petition must be dated and signed by the petitioner or the petitioner's representative. It must also include the name, mailing address, and telephone number of the petitioner and petitioner's representative and a statement indicating the person to whom communications concerning the petition should be directed.

661—10.102(17A) Notice of petition. Within 15 days after receipt of a petition for a declaratory order, the department shall give notice of the petition to all persons not served by the petitioner pursuant to 10.106(17A) to whom notice is required by any provision of law. The department may also give notice to any other persons.

661—10.103(17A) Intervention.

10.103(1) Any person who qualifies under any applicable provision of law as an intervenor and who files a petition for intervention within 20 days of the filing of a petition for declaratory order (after time for notice under 10.102(17A) and before 30-day time for agency action under 10.108(17A))

shall be allowed to intervene in a proceeding for a declaratory order.

10.103(2) Any person who files a petition for intervention at any time prior to the issuance of an order may be allowed to intervene in a proceeding for a declaratory order at the discretion of the department.

10.103(3) A petition for intervention shall be filed at the Administrative Services Division, Department of Public Safety, Wallace State Office Building, Des Moines, Iowa 50319. Such a petition is deemed filed when it is received by that office. The department shall provide the petitioner with a file-stamped copy of the petition for intervention if the petitioner provides an extra copy for this purpose. A petition for intervention must be typewritten or legibly handwritten in ink and must substantially conform to the following form:

DEPARTMENT OF PUBLIC SAFETY

Petition by (Name of Original Petitioner) for a Declaratory Order on (Cite provisions of law cited in original petition). } PETITION FOR INTERVENTION

The petition for intervention must provide the following information:

- 1. Facts supporting the intervenor's standing and qualifications for intervention.
2. The answers urged by the intervenor to the question or questions presented and a summary of the reasons urged in support of those answers.
3. Reasons for requesting intervention and disclosure of the intervenor's interest in the outcome.
4. A statement indicating whether the intervenor is currently a party to any proceeding involving the questions at issue and whether, to the intervenor's knowledge, those questions have been decided by, are pending determination by, or are under investigation by, any governmental entity.
5. The names and addresses of any additional persons, or a description of any additional class of persons, known by the intervenor to be affected by, or interested in, the questions presented.
6. Whether the intervenor consents to be bound by the determination of the matters presented in the declaratory order proceeding.

The petition must be dated and signed by the intervenor or the intervenor's representative. It must also include the name, mailing address, and telephone number of the intervenor and intervenor's representative, and a statement indicating the person to whom communications should be directed.

661—10.104(17A) Briefs. The petitioner or any intervenor may file a brief in support of the position urged. The department may request a brief from the petitioner, any intervenor, or any other person concerning the questions raised.

661—10.105(17A) Inquiries. Inquiries concerning the status of a declaratory order proceeding may be made to the Director, Administrative Services Division, Department of Public Safety, Wallace State Office Building, Des Moines, Iowa 50319.

661—10.106(17A) Service and filing of petitions and other papers.

10.106(1) When service required. Except where otherwise provided by law, every petition for declaratory order, petition for intervention, brief, or other paper filed in a proceeding for a declaratory order shall be served upon each of

## PUBLIC SAFETY DEPARTMENT[661](cont'd)

the parties of record to the proceeding, and on all other persons identified in the petition for declaratory order or petition for intervention as affected by or interested in the questions presented, simultaneously with their filing. The party filing a document is responsible for service on all parties and other affected or interested persons.

**10.106(2) Filing—when required.** All petitions for declaratory orders, petitions for intervention, briefs, or other papers in a proceeding for a declaratory order shall be filed with the Administrative Services Division, Department of Public Safety, Wallace State Office Building, Des Moines, Iowa 50319. All petitions, briefs, or other papers that are required to be served upon a party shall be filed simultaneously with the department.

**10.106(3) Method of service, time of filing, and proof of mailing.** Method of service, time of filing, and proof of mailing shall be as provided by rule 10.312(17A).

**661—10.107(17A) Consideration.** Upon request by petitioner, the department may schedule a brief and informal meeting between the original petitioner, all intervenors, and the department, a member of the department or a member of the staff of the department, to discuss the questions raised. The department may solicit comments from any person on the questions raised. Also, comments on the questions raised may be submitted to the department by any person.

**661—10.108(17A) Action on petition.**

**10.108(1)** Within the time allowed by 1998 Iowa Acts, chapter 1202, section 13(5), after receipt of a petition for a declaratory order, the commissioner of public safety or the commissioner's designee shall take action on the petition as required by 1998 Iowa Acts, chapter 1202, section 13(5).

**10.108(2)** The date of issuance of an order or of a refusal to issue an order is as defined in rule 10.302(17A).

**661—10.109(17A) Refusal to issue order.**

**10.109(1)** The department shall not issue a declaratory order where prohibited by 1998 Iowa Acts, chapter 1202, section 13(1), and may refuse to issue a declaratory order on some or all questions raised for the following reasons:

1. The petition does not substantially comply with the required form.

2. The petition does not contain facts sufficient to demonstrate that the petitioner will be aggrieved or adversely affected by the failure of the department of public safety to issue an order.

3. The department does not have jurisdiction over the questions presented in the petition.

4. The questions presented by the petition are also presented in a current rule making, contested case, or other agency or judicial proceeding, that may definitively resolve them.

5. The questions presented by the petition would more properly be resolved in a different type of proceeding or by another body with jurisdiction over the matter.

6. The facts or questions presented in the petition are unclear, overbroad, insufficient, or otherwise inappropriate as a basis upon which to issue an order.

7. There is no need to issue an order because the questions raised in the petition have been settled due to a change in circumstances.

8. The petition is not based upon facts calculated to aid in the planning of future conduct but is, instead, based solely upon prior conduct in an effort to establish the effect of that conduct or to challenge an agency decision already made.

9. The petition requests a declaratory order that would necessarily determine the legal rights, duties, or responsibilities of other persons who have not joined in the petition, intervened separately, or filed a similar petition and whose position on the questions presented may fairly be presumed to be adverse to that of petitioner.

10. The petitioner requests the department to determine whether a statute is unconstitutional on its face.

11. The petition relates to any criminal investigation.

12. The petition concerns any procedure or practice of the department or any other agency related to initiation or conduct of criminal investigations or referral of matters for possible criminal investigation or prosecution.

**10.109(2)** A refusal to issue a declaratory order shall indicate the specific grounds for the refusal, unless it pertains to a matter under criminal investigation, or which has been referred for possible criminal prosecution, in which event no information which might compromise the investigation or prosecution shall be released to the petitioner or any intervenor. A refusal to issue a declaratory order constitutes final agency action on the petition.

**10.109(3)** Refusal to issue a declaratory order pursuant to this provision does not preclude the filing of a new petition that seeks to eliminate the grounds for the refusal to issue an order.

**661—10.110(17A) Contents of declaratory order—effective date.** In addition to the order itself, a declaratory order must contain the date of its issuance, the name of petitioner and all intervenors, the specific statutes, rules, policies, decisions, or orders involved, the particular facts upon which it is based, and the reasons for its conclusion.

A declaratory order is effective on the date of issuance.

**661—10.111(17A) Copies of orders.** A copy of all orders issued in response to a petition for a declaratory order shall be mailed promptly to each original petitioner and to each intervenor.

**661—10.112(17A) Effect of a declaratory order.** A declaratory order has the same status and binding effect as a final order issued in a contested case proceeding. It is binding on the department, the petitioner, and any intervenors who consent to be bound and is applicable only in circumstances where the relevant facts and the law involved are indistinguishable from those on which the order was based. As to all other persons, a declaratory order serves only as precedent and is not binding on the department. The issuance of a declaratory order constitutes final agency action on the petition.

**661—10.113 to 10.200** Reserved.

AGENCY PROCEDURE FOR RULE MAKING

**661—10.201(17A) Applicability.** Except to the extent otherwise expressly provided by statute, all rules adopted by the department are subject to the provisions of Iowa Code chapter 17A, the Iowa administrative procedure Act, and the provisions of this chapter.

**661—10.202(17A) Advice on possible rules before notice of proposed rule adoption.** In addition to seeking information by other methods, the department may, before publication of a Notice of Intended Action under Iowa Code section 17A.4(1)"a," solicit comments from the public on a subject matter of possible rule making by the department by causing notice to be published in the Iowa Administrative Bulletin of the subject matter and indicating where, when, and how persons may comment.

## PUBLIC SAFETY DEPARTMENT[661](cont'd)

**661—10.203(17A) Public rule-making docket.**

**10.203(1)** Docket maintained. The department shall maintain a current public rule-making docket.

**10.203(2)** Anticipated rule making. The rule-making docket shall list each anticipated rule-making proceeding. A rule-making proceeding is deemed "anticipated" from the time a draft of proposed rules is distributed for internal discussion within the department, with the approval of the commissioner of public safety. For each anticipated rule-making proceeding the docket shall contain a listing of the precise subject matter which may be submitted for consideration by the rule-making authority for subsequent proposal under the provisions of Iowa Code section 17A.4(1)"a," the name and address of department personnel with whom persons may communicate with respect to the matter, and an indication of the present status within the department of that possible rule. The department may also include in the docket other subjects upon which public comment is desired.

**10.203(3)** Pending rule-making proceedings. The rule-making docket shall list each pending rule-making proceeding. A rule-making proceeding is pending from the time it is commenced, by publication in the Iowa Administrative Bulletin of a Notice of Intended Action pursuant to Iowa Code section 17A.4(1)"a," to the time it is terminated, by publication of a Notice of Termination in the Iowa Administrative Bulletin or the rule becoming effective. For each rule-making proceeding, the docket shall indicate:

- a. The subject matter of the proposed rule;
- b. A citation to all published notices relating to the proceeding;
- c. Where written submissions on the proposed rule may be inspected;
- d. The time during which written submissions may be made;
- e. The names of persons who have made written requests for an opportunity to make oral presentations on the proposed rule, where those requests may be inspected, and where and when oral presentations may be made;
- f. Whether a written request for the issuance of a regulatory analysis, or a concise statement of reasons, has been filed, whether such an analysis or statement or a fiscal impact statement has been issued, and where any such written request, analysis, or statement may be inspected;
- g. The current status of the proposed rule and any department determinations with respect thereto;
- h. Any known timetable for department decisions or other action in the proceeding;
- i. The date of the rule's adoption;
- j. The date of the rule's filing, indexing, and publication;
- k. The date on which the rule will become effective; and
- l. Where the rule-making record may be inspected.

**661—10.204(17A) Notice of proposed rule making.**

**10.204(1)** Contents. At least 35 days before the adoption of a rule the department shall cause Notice of Intended Action to be published in the Iowa Administrative Bulletin. The Notice of Intended Action shall include:

- a. A brief explanation of the purpose of the proposed rule;
- b. The specific legal authority for the proposed rule;
- c. Except to the extent impracticable, the text of the proposed rule;
- d. Where, when, and how persons may present their views on the proposed rule; and

e. Where, when, and how persons may demand an oral proceeding on the proposed rule if the notice does not already provide for one.

Where inclusion of the complete text of a proposed rule in the Notice of Intended Action is impracticable, the department shall include in the notice a statement fully describing the specific subject matter of the omitted portion of the text of the proposed rule, the specific issues to be addressed by that omitted text of the proposed rule, and the range of possible choices being considered by the department for the resolution of each of those issues.

**10.204(2)** Incorporation by reference. A proposed rule may incorporate other materials by reference only if it complies with all of the requirements applicable to the incorporation by reference of other materials in an adopted rule that are contained in subrule 10.212(2) of this chapter.

**10.204(3)** Copies of notices. Persons desiring to receive copies of future Notices of Intended Action by subscription must file with the Plans and Research Bureau, Department of Public Safety, Wallace State Office Building, Des Moines, Iowa 50319, a written request indicating the name and address to which such notices should be sent. Within seven days after submission of a Notice of Intended Action to the administrative rules coordinator for publication in the Iowa Administrative Bulletin, the department shall mail or electronically transmit a copy of that notice to subscribers who have filed a written request for either mailing or electronic transmittal with the department for Notices of Intended Action. The written request shall be accompanied by payment of the subscription price which may cover the full cost of the subscription service, including its administrative overhead and the cost of copying and mailing the Notices of Intended Action for a period of one year. The price for such a subscription can be obtained from the Plans and Research Bureau, Department of Public Safety, at the address above, by telephone at (515)281-5042, or by electronic mail via the Internet at [admrule@dps.state.ia.us](mailto:admrule@dps.state.ia.us).

**661—10.205(17A) Public participation.**

**10.205(1)** Written comments. For at least 20 days after publication of the Notice of Intended Action, persons may submit argument, data, and views, in writing, on the proposed rule. Such written submissions should identify the proposed rule to which they relate and should be submitted to the Plans and Research Bureau, Department of Public Safety, Wallace State Office Building, Des Moines, Iowa 50319, or the person or office designated in the Notice of Intended Action.

**10.205(2)** Oral proceedings. The department may, at any time, schedule an oral proceeding on a proposed rule. The department shall schedule an oral proceeding on a proposed rule if, within 20 days after the published Notice of Intended Action, a written request for an opportunity to make oral presentations is submitted to the department by the administrative rules review committee, a governmental subdivision, an agency, an association having not less than 25 members, or at least 25 persons. That request must also contain the following additional information:

1. A request by one or more individual persons must be signed by each of them and include the address and telephone number of each of them.
2. A request by an association must be signed by an officer or designee of the association and must contain a statement that the association has at least 25 members and the address and telephone number of the person signing that request.

## PUBLIC SAFETY DEPARTMENT[661](cont'd)

3. A request by an agency or governmental subdivision must be signed by an official having authority to act on behalf of the entity and must contain the address and telephone number of the person signing that request.

**10.205(3) Conduct of oral proceedings.**

a. Applicability. This subrule applies only to those oral rule-making proceedings in which an opportunity to make oral presentations is authorized or required by Iowa Code section 17A.4(1)"b" as amended by 1998 Iowa Acts, chapter 1202, section 8, or this chapter.

b. Scheduling and notice. An oral proceeding on a proposed rule may be held in one or more locations and shall not be held earlier than 20 days after notice of its location and time is published in the Iowa Administrative Bulletin. That notice shall also identify the proposed rule by ARC number and citation to the Iowa Administrative Bulletin.

c. Presiding officer. The commissioner of public safety or the commissioner's designee shall preside at the oral proceeding on a proposed rule. If the commissioner does not preside, the presiding officer shall prepare a memorandum for consideration by the department summarizing the contents of the presentations made at the oral proceeding unless the commissioner determines that such a memorandum is unnecessary. If the oral proceeding relates to rule making which falls within the authority of an official other than the commissioner, the oral proceeding shall be presided over by the official with rule making authority or that official's designee.

d. Conduct of proceeding. At an oral proceeding on a proposed rule, persons may make oral statements and make documentary and physical submissions, which may include data, views, comments or arguments concerning the proposed rule. Persons wishing to make oral presentations at such a proceeding are encouraged to notify the agency at least one business day prior to the proceeding and indicate the general subject of their presentations. At the proceeding, those who participate shall indicate their names and addresses, identify any persons or organizations they may represent, and provide any other information relating to their participation deemed appropriate by the presiding officer. Oral proceedings shall be open to the public and shall be recorded by stenographic or electronic means.

(1) At the beginning of the oral proceeding, the presiding officer shall give a brief synopsis of the proposed rule, a statement of the statutory authority for the proposed rule, and the reasons for the agency decision to propose the rule. The presiding officer may place time limitations on individual oral presentations when necessary to ensure the orderly and expeditious conduct of the oral proceeding. To encourage joint oral presentations and to avoid repetition, additional time may be provided for persons whose presentations represent the views of other individuals as well as their own views.

(2) Persons making oral presentations are encouraged to summarize matters which have already been submitted in writing.

(3) The presiding officer shall have the authority to take any reasonable action necessary for the orderly conduct of the meeting.

(4) Physical and documentary submissions presented by participants in the oral proceeding shall be submitted to the presiding officer. Such submissions become the property of the agency.

(5) The oral proceeding may be continued by the presiding officer to a later time without notice other than by announcement at the hearing.

(6) Participants in an oral proceeding shall not be required to take an oath or to submit to cross-examination. However, the presiding officer in an oral proceeding may question participants and permit the questioning of participants by other representatives of the department who may be present about any matter relating to that rule-making proceeding, including any prior written submissions made by those participants in that proceeding; but no participant shall be required to answer any question.

(7) The presiding officer in an oral proceeding may permit rebuttal statements and request the filing of written statements subsequent to the adjournment of the oral presentations.

**10.205(4) Additional information.** In addition to receiving written comments and oral presentations on a proposed rule according to the provisions of this rule, the department may obtain information concerning a proposed rule through any other lawful means deemed appropriate under the circumstances.

**10.205(5) Accessibility.** The department shall schedule oral proceedings in rooms accessible to and functional for persons with physical disabilities. Persons who have special requirements should contact the Plans and Research Bureau, Department of Public Safety, Wallace State Office Building, Des Moines, Iowa 50319, in advance to arrange access or other needed services.

**661—10.206(17A) Regulatory analysis.**

**10.206(1) Definition of small business.** A "small business" is defined in 1998 Iowa Acts, chapter 1202, section 10(7).

**10.206(2) Mailing list.** Small businesses or organizations of small businesses may be registered on the department's small business impact list by making a written application addressed to Plans and Research Bureau, Department of Public Safety, Wallace State Office Building, Des Moines, Iowa 50319. The application for registration shall state:

a. The name of the small business or organization of small businesses;

b. Its address;

c. The name of a person authorized to transact business for the applicant;

d. A description of the applicant's business or organization. An organization representing 25 or more persons who qualify as a small business shall indicate that fact.

e. Whether the registrant desires copies of Notices of Intended Action at cost, or desires advance notice of the subject of all or some specific category of proposed rule making affecting small business.

The department may at any time request additional information from the applicant to determine whether the applicant is qualified as a small business or as an organization of 25 or more small businesses. The department may periodically send a letter to each registered small business or organization of small businesses asking whether that business or organization wishes to remain on the registration list. The name of a small business or organization of small businesses will be removed from the list if a negative response is received, or if no response is received within 30 days after the letter is sent.

**10.206(3) Time of mailing.** Within seven days after submission of a Notice of Intended Action to the administrative rules coordinator for publication in the Iowa Administrative Bulletin, the department shall mail to all registered small businesses or organizations of small businesses, in accordance with their request, either a copy of the Notice of Intended Action or notice of the subject of that proposed rule

## PUBLIC SAFETY DEPARTMENT[661](cont'd)

making. In the case of a rule that may have an impact on small business adopted in reliance upon Iowa Code section 17A.4(2), the department shall mail notice of the adopted rule to registered businesses or organizations prior to the time the adopted rule is published in the Iowa Administrative Bulletin.

**10.206(4)** Qualified requesters for regulatory analysis—economic impact. The department shall issue a regulatory analysis of a proposed rule that conforms to the requirements of 1998 Iowa Acts, chapter 1202, section 10(2a), after a proper request from:

- a. The administrative rules coordinator;
- b. The administrative rules review committee.

**10.206(5)** Qualified requesters for regulatory analysis—business impact. The department shall issue a regulatory analysis of a proposed rule that conforms to the requirements of 1998 Iowa Acts, chapter 1202, section 10(2b), after a proper request from:

- a. The administrative rules review committee;
- b. The administrative rules coordinator;
- c. At least 25 or more persons who sign the request provided that each represents a different small business;
- d. An organization representing at least 25 small businesses. That organization shall list the name, address and telephone number of not less than 25 small businesses it represents.

**10.206(6)** Time period for analysis. Upon receipt of a timely request for a regulatory analysis, the department shall adhere to the time lines described in 1998 Iowa Acts, chapter 1202, section 10(4).

**10.206(7)** Contents of request. A request for a regulatory analysis is made when it is mailed or delivered to the Plans and Research Bureau, Department of Public Safety, Wallace State Office Building, Des Moines, Iowa 50319. The request shall be in writing and satisfy the requirements of 1998 Iowa Acts, chapter 1202, section 10(1).

**10.206(8)** Contents of concise summary. The contents of the concise summary shall conform to the requirements of 1998 Iowa Acts, chapter 1202, section 10(4,5).

**10.206(9)** Publication of a concise summary. The department shall make available, to the maximum extent feasible, copies of the published summary in conformance with 1998 Iowa Acts, chapter 1202, section 10(5).

**10.206(10)** Regulatory analysis contents—rules review committee or rules coordinator. When a regulatory analysis is issued in response to a written request from the administrative rules review committee or the administrative rules coordinator, the regulatory analysis shall conform to the requirements of 1998 Iowa Acts, chapter 1202, section 10(2a), unless a written request expressly waives one or more of the items listed in the section.

**10.206(11)** Regulatory analysis contents—substantial impact on small business. When a regulatory analysis is issued in response to a written request from the administrative rules review committee, the administrative rules coordinator, at least 25 persons signing that request who each qualify as a small business or by an organization representing at least 25 small businesses, the regulatory analysis shall conform to the requirements of 1998 Iowa Acts, chapter 1202, section 10(2b).

**661—10.207(17A,25B) Fiscal impact statement.**

**10.207(1)** A proposed rule that mandates additional combined expenditures exceeding \$100,000 by all affected political subdivisions or agencies and entities which contract with political subdivisions to provide services must be accompanied by a fiscal impact statement outlining the costs associat-

ed with the rule. A fiscal impact statement must satisfy the requirements of Iowa Code section 25B.6.

**10.207(2)** If the department determines at the time it adopts a rule that the fiscal impact statement upon which the rule is based contains errors, the department shall, at the same time, issue a corrected fiscal impact statement and publish the corrected fiscal impact statement in the Iowa Administrative Bulletin.

**661—10.208(17A) Time and manner of rule adoption.**

**10.208(1)** Time of adoption. The department shall not adopt a rule until the period for making written submissions and oral presentations has expired. Within 180 days after the later of the publication of the Notice of Intended Action, or the end of oral proceedings thereon, the department shall adopt a rule pursuant to the rule-making proceeding or terminate the proceeding by publication of a notice to that effect in the Iowa Administrative Bulletin.

**10.208(2)** Consideration of public comment. Before the adoption of a rule, the department shall consider fully all of the written submissions and oral submissions received in that rule-making proceeding or any memorandum summarizing such oral submissions, and any regulatory analysis or fiscal impact statement issued in that rule-making proceeding.

**10.208(3)** Reliance on department expertise. Except as otherwise provided by law, the department may use its own experience, technical competence, specialized knowledge, and judgment in the adoption of a rule.

**661—10.209(17A) Variance between adopted rule and published notice of proposed rule adoption.**

**10.209(1)** The department shall not adopt a rule that differs from the rule proposed in the Notice of Intended Action on which the rule is based unless:

- a. The differences are within the scope of the subject matter announced in the Notice of Intended Action and are in character with the issues raised in that notice; and
- b. The differences are a logical outgrowth of the contents of that Notice of Intended Action and the comments submitted in response thereto; and
- c. The Notice of Intended Action provided fair warning that the outcome of that rule-making proceeding could be the rule in question.

**10.209(2)** In determining whether the Notice of Intended Action provided fair warning that the outcome of that rule-making proceeding could be the rule in question, the department shall consider the following factors:

- a. The extent to which persons who will be affected by the rule should have understood that the rule-making proceeding on which it is based could affect their interests;
- b. The extent to which the subject matter of the rule or the issues determined by the rule are different from the subject matter or issues contained in the Notice of Intended Action; and
- c. The extent to which the effects of the rule differ from the effects of the proposed rule contained in the Notice of Intended Action.

**10.209(3)** The department shall commence a rule-making proceeding within 60 days of its receipt of a petition for rule making seeking the amendment or repeal of a rule that differs from the proposed rule contained in the Notice of Intended Action upon which the rule is based, unless the department finds that the differences between the adopted rule and the proposed rule are so insubstantial as to make such a rule-making proceeding wholly unnecessary. A copy of any such finding and the petition to which it responds shall be sent to petitioner, the administrative rules coordinator, and

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the administrative rules review committee, within three days of its issuance.

**10.209(4)** Concurrent rule-making proceedings. Nothing in this rule disturbs the discretion of the department to initiate, concurrently, several different rule-making proceedings on the same subject with several different published Notices of Intended Action.

**661—10.210(17A) Exemptions from public rule-making procedures.**

**10.210(1)** Omission of notice and comment. To the extent the department for good cause finds that public notice and participation are unnecessary, impracticable, or contrary to the public interest in the process of adopting a particular rule, the department may adopt that rule without publishing advance Notice of Intended Action in the Iowa Administrative Bulletin and without providing for written or oral public submissions prior to its adoption. The department shall incorporate the required finding and a brief statement of its supporting reasons in each rule adopted in reliance upon this subrule.

**10.210(2)** Reserved.

**10.210(3)** Public proceedings on rules adopted without them. The department may, at any time, commence a standard rule-making proceeding for the adoption of a rule that is identical or similar to a rule it adopts in reliance upon subrule 10.210(1). Upon written petition by a governmental subdivision, the administrative rules review committee, the department, the administrative rules coordinator, an association having not less than 25 members, or at least 25 persons, the department of public safety shall commence a standard rule-making proceeding for any rule specified in the petition that was adopted in reliance upon subrule 10.210(1). Such a petition must be filed within one year of the publication of the specified rule in the Iowa Administrative Bulletin as an adopted rule. The rule-making proceeding on that rule must be commenced within 60 days of the receipt of such a petition. After a standard rule-making proceeding commenced pursuant to this subrule, the department may either readopt the rule it adopted without benefit of all usual procedures on the basis of subrule 10.210(1), or may take any other lawful action, including the amendment or repeal of the rule in question, with whatever further proceedings are appropriate.

**661—10.211(17A) Concise statement of reasons.**

**10.211(1)** General. When requested by a person, either prior to the adoption of a rule or within 30 days after its publication in the Iowa Administrative Bulletin as an adopted rule, the department shall issue a concise statement of reasons for the rule. Requests for such a statement must be in writing and be delivered to the Plans and Research Bureau, Department of Public Safety, Wallace State Office Building, Des Moines, Iowa 50319. The request should indicate whether the statement is sought for all or only a specified part of the rule. Requests will be considered made on the date received.

**10.211(2)** Contents. The concise statement of reasons shall contain:

- a. The reasons for adopting the rule;
- b. An indication of any change between the text of the proposed rule contained in the published Notice of Intended Action and the text of the rule as finally adopted, with the reasons for any such change;
- c. The principal reasons urged in the rule-making proceeding for and against the rule, and the department's reasons for overruling the arguments made against the rule.

**10.211(3)** Time of issuance. After a proper request, the department shall issue a concise statement of reasons by the later of the time the rule is adopted or 35 days after receipt of the request.

**661—10.212(17A) Contents, style, and form of rule.**

**10.212(1)** Contents. Each rule adopted by the department shall contain the text of the rule and, in addition:

- a. The date the department adopted the rule;
- b. A brief explanation of the principal reasons for the rule-making action if such reasons are required by 1998 Iowa Acts, chapter 1202, section 8, or the department in its discretion decides to include such reasons;
- c. A reference to all rules repealed, amended, or suspended by the rule;
- d. A reference to the specific statutory or other authority authorizing adoption of the rule;
- e. Any findings required by any provision of law as a prerequisite to adoption or effectiveness of the rule;
- f. The effective date of the rule.

**10.212(2)** Incorporation by reference. The department may incorporate by reference in a proposed or adopted rule, and without causing publication of the incorporated matter in full, all or any part of a code, standard, rule, or other matter if the department finds that the incorporation of its text in the department proposed or adopted rule would be unduly cumbersome, expensive, or otherwise inexpedient. The reference in the department proposed or adopted rule shall fully and precisely identify the incorporated matter by location, title, citation, date, and edition, if any; shall briefly indicate the precise subject and the general contents of the incorporated matter; and shall state that the proposed or adopted rule does not include any later amendments or editions of the incorporated matter. The department may incorporate such matter by reference in a proposed or adopted rule only if the department makes copies of it readily available to the public. The rule shall state how and where copies of the incorporated matter may be obtained at cost from the department, and how and where copies may be obtained from the agency, organization, association, or persons originally issuing that matter. The department shall retain permanently a copy of any materials incorporated by reference in a rule of the department.

*If the department adopts standards by reference to another publication, it shall provide a copy of the publication containing the standards to the administrative rules coordinator for deposit in the state law library and may make the standards available electronically.*

**10.212(3)** References to materials not published in full. When the administrative code editor decides to omit the full text of a proposed or adopted rule because publication of the full text would be unduly cumbersome, expensive, or otherwise inexpedient, the department shall prepare and submit to the administrative code editor for inclusion in the Iowa Administrative Bulletin and Iowa Administrative Code a summary statement describing the specific subject matter of the omitted material. This summary statement shall include the title and a brief description sufficient to inform the public of the specific nature and subject matter of the proposed or adopted rules, and of significant issues involved in these rules. The summary statement shall also describe how a copy of the full text of the proposed or adopted rule, including any unpublished matter and any matter incorporated by reference, may be obtained from the department. The department will provide a copy of that full text, at actual cost, upon request and shall make copies of the full text available

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for review at the state law library and may make the standards available electronically.

At the request of the administrative code editor, the department shall provide a proposed statement explaining why publication of the full text would be unduly cumbersome, expensive, or otherwise inexpedient.

**10.212(4) Style and form.** In preparing its rules, the department shall follow the uniform numbering system, form, and style prescribed by the administrative rules coordinator.

**661—10.213(17A) Agency rule-making record.**

**10.213(1) Requirement.** The department shall maintain an official rule-making record for each rule it proposes by publication in the Iowa Administrative Bulletin of a Notice of Intended Action, or adopts. The rule-making record and materials incorporated by reference must be available for public inspection.

**10.213(2) Contents.** The department rule-making record shall contain:

a. Copies of all publications in the Iowa Administrative Bulletin with respect to the rule or the proceeding upon which the rule is based and any file-stamped copies of department submissions to the administrative rules coordinator concerning that rule or the proceeding upon which it is based;

b. Copies of any portions of the department's public rule-making docket containing entries relating to the rule or the proceeding upon which the rule is based;

c. All written petitions, requests, and submissions received by the department, and all other written materials of a factual nature as distinguished from opinion that are relevant to the merits of the rule and that were created or compiled by the department and considered by the commissioner of public safety or other official with rule-making authority, in connection with the formulation, proposal, or adoption of the rule or the proceeding upon which the rule is based, except to the extent the department is authorized by law to keep them confidential; provided, however, that when any such materials are deleted because they are authorized by law to be kept confidential, the department shall identify in the record the particular materials deleted and state the reasons for that deletion;

d. Any official transcript of oral presentations made in the proceeding upon which the rule is based or, if not transcribed, the stenographic record or electronic recording of those presentations, and any memorandum prepared by a presiding officer summarizing the contents of those presentations;

e. A copy of any regulatory analysis or fiscal impact statement prepared for the proceeding upon which the rule is based;

f. A copy of the rule and any concise statement of reasons prepared for that rule;

g. All petitions for amendment or repeal or suspension of the rule;

h. A copy of any objection to the issuance of that rule without public notice and participation that was filed pursuant to Iowa Code section 17A.4(2) by the administrative rules review committee, the governor, or the attorney general;

i. A copy of any objection to the rule filed by the administrative rules review committee, the governor, or the attorney general pursuant to Iowa Code section 17A.4(4), and any department response to that objection;

j. A copy of any significant written criticism of the rule, including a summary of any petitions for waiver of the rule; and

k. A copy of any executive order concerning the rule.

**10.213(3) Effect of record.** Except as otherwise required by a provision of law, the department rule-making record required by this rule need not constitute the exclusive basis for department action on that rule.

**10.213(4) Maintenance of record.** The department shall maintain the rule-making record for a period of not less than five years from the later of the date the rule to which it pertains became effective, the date of the Notice of Intended Action, or the date of any written criticism as described in 10.213(2) "g," "h," "i," or "j."

**661—10.214(17A) Filing of rules.** The department shall file each rule it adopts in the office of the administrative rules coordinator. The filing must be executed as soon after adoption of the rule as is practicable. At the time of filing, each rule must have attached to it any fiscal impact statement and any concise statement of reasons that was issued with respect to that rule. If a fiscal impact statement or statement of reasons for that rule was not issued until a time subsequent to the filing of that rule, the note or statement must be attached to the filed rule within five working days after the note or statement is issued. In filing a rule, the department shall use the standard form prescribed by the administrative rules coordinator.

**661—10.215(17A) Effectiveness of rules prior to publication.**

**10.215(1) Grounds.** The department may make a rule effective after its filing at any stated time prior to 35 days after its indexing and publication in the Iowa Administrative Bulletin if it finds that a statute so provides, the rule confers a benefit or removes a restriction on some segment of the public, or that the effective date of the rule is necessary to avoid imminent peril to the public health, safety, or welfare. The department shall incorporate the required finding and a brief statement of its supporting reasons in each rule adopted in reliance upon this subrule.

**10.215(2) Special notice.** When the department makes a rule effective prior to its indexing and publication in reliance upon the provisions of Iowa Code section 17A.5(2)"b"(3), the department shall employ all reasonable efforts to make its contents known to the persons who may be affected by that rule prior to the rule's indexing and publication. The term "all reasonable efforts" requires the department to employ the most effective and prompt means of notice rationally calculated to inform potentially affected parties of the effectiveness of the rule that is justified and practical under the circumstances considering the various alternatives available for this purpose, the comparative costs to the department of utilizing each of those alternatives, and the harm suffered by affected persons from any lack of notice concerning the contents of the rule prior to its indexing and publication. The means that may be used for providing notice of such rules prior to their indexing and publication include, but are not limited to, any one or more of the following means: radio, newspaper, television, signs, mail, telephone, personal notice or electronic means.

A rule made effective prior to its indexing and publication in reliance upon the provisions of Iowa Code section 17A.5(2)"b"(3) shall include in that rule a statement describing the reasonable efforts that will be used to comply with the requirements of subrule 10.215(2).

**661—10.216(17A) General statements of policy.**

**10.216(1) Compilation, indexing, public inspection.** The department shall maintain an official, current, and dated compilation that is indexed by subject, containing all of its

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general statements of policy within the scope of Iowa Code section 17A.2(10)“a,”“c,”“f,”“g,”“h,”“k.” Each addition to, change in, or deletion from the official compilation must also be dated, indexed, and a record thereof kept. Except for those portions containing rules governed by Iowa Code section 17A.2(7)“f,” or otherwise authorized by law to be kept confidential, the compilation must be made available for public inspection and copying.

10.216(2) Enforcement of requirements. A general statement of policy subject to the requirements of this subsection shall not be relied on by the department to the detriment of any person who does not have actual, timely knowledge of the contents of the statement until the requirements of subrule 10.216(1) are satisfied. This provision is inapplicable to the extent necessary to avoid imminent peril to the public health, safety, or welfare.

661—10.217(17A) Review by department of rules.

10.217(1) Any interested person, association, agency, or political subdivision may submit a written request to the administrative rules coordinator requesting the department to conduct a formal review of a specified rule. Upon approval of that request by the administrative rules coordinator, the department shall conduct a formal review of a specified rule to determine whether a new rule should be adopted instead or the rule should be amended or repealed. The department may refuse to conduct a review if it has conducted such a review of the specified rule within five years prior to the filing of the written request.

10.217(2) In conducting the formal review, the department shall prepare within a reasonable time a written report summarizing its findings, its supporting reasons, and any proposed course of action. The report must include a concise statement of the department’s findings regarding the rule’s effectiveness in achieving its objectives, including a summary of any available supporting data. The report shall also concisely describe significant written criticisms of the rule received during the previous five years, including a summary of any petitions for waiver of the rule received by the department or granted by the department. The report shall describe alternative solutions to resolve the criticisms of the rule, the reasons any were rejected, and any changes made in the rule in response to the criticisms as well as the reasons for the changes. A copy of the department’s report shall be sent to the administrative rules review committee and the administrative rules coordinator. The report must also be available for public inspection.

661—10.218 (17A) Petition for rule making. Any person or agency may file a petition for rule making with the department at the Plans and Research Bureau, Department of Public Safety, Wallace State Office Building, Des Moines, Iowa 50319. A petition is deemed filed when it is received by that office. The agency must provide the petitioner with a file-stamped copy of the petition if the petitioner provides the agency an extra copy for this purpose. The petition must be typewritten or legibly handwritten in ink and must substantially conform to the following form:

DEPARTMENT OF PUBLIC SAFETY

Petition by (Name of Petitioner) for the (adoption, amendment, or repeal) of rules relating to (state subject matter).



PETITION FOR RULE MAKING

The petition must provide the following information:

1. A statement of the specific rule-making action sought by the petitioner including the text or a summary of the contents of the proposed rule or amendment to a rule and, if it is a petition to amend or repeal a rule, a citation and the relevant language to the particular portion or portions of the rule proposed to be amended or repealed.
2. A citation to any law deemed relevant to the agency’s authority to take the action urged or to the desirability of that action.
3. A brief summary of petitioner’s arguments in support of the action urged in the petition.
4. A brief summary of any data supporting the action urged in the petition.
5. The names and addresses of other persons, or a description of any class of persons, known by petitioner to be affected by or interested in, the proposed action which is the subject of the petition.
6. Any request by petitioner for a meeting provided for by subrule 10.221(1).

10.218(1) The petition must be dated and signed by the petitioner or the petitioner’s representative. It must also include the name, mailing address, and telephone number of the petitioner and petitioner’s representative, and a statement indicating the person to whom communications concerning the petition should be directed.

10.218(2) The department may deny a petition because it does not substantially conform to the required form.

661—10.219(17A) Briefs. The petitioner may attach a brief to the petition in support of the action urged in the petition. The department may request a brief from the petitioner or from any other person concerning the substance of the petition.

661—10.220(17A) Inquiries. Inquiries concerning the status of a petition for rule making may be made to the Administrative Rules Coordinator, Plans and Research Bureau, Department of Public Safety, Wallace State Office Building, Des Moines, Iowa 50319.

661—10.221(17A) Agency consideration.

10.221(1) Within 14 days after the filing of a petition, the department must submit a copy of the petition and any accompanying brief to the administrative rules coordinator and to the administrative rules review committee. Upon request by petitioner in the petition, the department may schedule a brief and informal meeting between the petitioner and the agency, a member of the agency, or a member of the staff of the agency, to discuss the petition. The department may request the petitioner to submit additional information or argument concerning the petition. The department may also solicit comments from any person on the substance of the petition. Also, comments on the substance of the petition may be submitted to the department by any person.

10.221(2) Within 60 days after the filing of the petition, or within any longer period agreed to by the petitioner, the department must, in writing, deny the petition, and notify petitioner of its action and the specific grounds for the denial, or grant the petition and notify petitioner that it has instituted rule-making proceedings on the subject of the petition. Petitioner shall be deemed notified of the denial or grant of the petition on the date when the agency mails or delivers the required notification to petitioner.

10.221(3) Denial of a petition because it does not substantially conform to the required form does not preclude the filing of a new petition on the same subject that seeks to

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eliminate the grounds for the agency's rejection of the petition.

**661—10.222(17A) Waiver of rules.** The commissioner of public safety may grant waivers of rules. Waivers may be granted at the discretion of the commissioner, upon a finding that a need for the waiver has been established and that the purpose of the rule will be achieved through equivalent technology or compensating factors. Requests for waivers shall be addressed in writing to the Administrative Services Division, Department of Public Safety, Wallace State Office Building, Des Moines, Iowa 50319. Each application must contain the following information:

1. The specific rule(s) for which a waiver is requested.
2. Documentation of the need for a waiver. Explanation should be given of the unreasonable hardship which would be created by compliance with the rule(s) cited in the application.
3. Explanation of alternative means to achieve the purpose of the rule(s) through use of equivalent technology or compensating factors.

The commissioner may request any additional information deemed relevant to a waiver request. The commissioner shall grant or deny the requested waiver within 60 days of receiving all requested information.

**661—10.223 to 10.300** Reserved.

## CONTESTED CASES

**661—10.301(17A) Scope and applicability.** Rules 661—10.301(17A) to 10.332(17A) apply to contested case proceedings conducted by the department.

**661—10.302(17A) Definitions.** Except where otherwise specifically defined by law:

"Contested case" means a proceeding defined by Iowa Code section 17A.2(5) and includes any matter defined as a no factual dispute contested case under 1998 Iowa Acts, chapter 1202, section 14.

"Issuance" means the date of mailing of a decision or order or date of delivery if service is by other means unless another date is specified in the order.

"Party" means each person or agency named or admitted as a party or properly seeking and entitled as of right to be admitted as a party.

"Presiding officer" means the commissioner of public safety or other person designated by the commissioner to preside over a contested case proceeding.

"Proposed decision" means the presiding officer's recommended findings of fact, conclusions of law, decision, and order in a contested case in which the commissioner of public safety did not preside.

**661—10.303(17A) Time requirements.**

**10.303(1)** Time shall be computed as provided in Iowa Code subsection 4.1(34).

**10.303(2)** For good cause, the presiding officer may extend or shorten the time to take any action, except as precluded by statute or by other provision of law. Except for good cause stated in the record, before extending or shortening the time to take any action, the presiding officer shall afford all parties an opportunity to be heard or to file written arguments.

**661—10.304(17A) Requests for contested case proceeding.** Any person claiming an entitlement to a contested case proceeding shall file a written request for such a proceeding within the time specified by the particular rules or statutes

governing the subject matter or, in the absence of such law, the time specified in the agency action in question.

The request for a contested case proceeding should state the name and address of the requester, identify the specific agency action which is disputed, and where the requester is represented by a lawyer identify the provisions of law or precedent requiring or authorizing the holding of a contested case proceeding in the particular circumstances involved, and include a short and plain statement of the issues of material fact in dispute.

Requests for contested case proceedings shall be filed with the Administrative Services Division, Department of Public Safety, Wallace State Office Building, Des Moines, Iowa 50319.

**661—10.305(17A) Notice of hearing.**

**10.305(1) Delivery.** Delivery of the notice of hearing constitutes the commencement of the contested case proceeding. Delivery may be executed by:

- a. Personal service as provided in the Iowa Rules of Civil Procedure; or
- b. Certified mail, return receipt requested; or
- c. First-class mail; or
- d. Publication, as provided in the Iowa Rules of Civil Procedure.

**10.305(2) Contents.** The notice of hearing shall contain the following information:

- a. A statement of the time, place, and nature of the hearing;
- b. A statement of the legal authority and jurisdiction under which the hearing is to be held;
- c. A reference to the particular sections of the statutes and rules involved;
- d. A short and plain statement of the matters asserted. If the department or other party is unable to state the matters in detail at the time the notice is served, the initial notice may be limited to a statement of the issues involved. Thereafter, upon application, a more definite and detailed statement shall be furnished;
- e. Identification of all parties including the name, address and telephone number of the person who will act as advocate for the department or the state and of parties' counsel where known;
- f. Reference to the procedural rules governing conduct of the contested case proceeding;
- g. Reference to the procedural rules governing informal settlement;
- h. Identification of the presiding officer, if known. If not known, a description of who will serve as presiding officer; and
- i. Notification of the time period in which a party may request, pursuant to 1998 Iowa Acts, chapter 1202, section 15(1), and rule 10.306(17A), that the presiding officer be an administrative law judge.

**661—10.306(17A) Presiding officer.**

**10.306(1)** Any party who wishes to request that the presiding officer assigned to render a proposed decision be an administrative law judge employed by the department of inspections and appeals must file a written request within 20 days after service of a notice of hearing which identifies or describes the presiding officer as the agency head.

**10.306(2)** The commissioner of public safety or the commissioner's designee may deny the request only upon a finding that one or more of the following apply:

- a. Neither the department nor any officer of the agency under whose authority the contested case is to take place is a

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named party to the proceeding or a real party in interest to that proceeding.

b. There is a compelling need to expedite issuance of a final decision in order to protect the public health, safety, or welfare.

c. An administrative law judge is unavailable to hear the case within a reasonable time.

d. The case involves significant policy issues of first impression that are inextricably intertwined with the factual issues presented.

e. The demeanor of the witnesses is likely to be dispositive in resolving the disputed factual issues.

f. Funds are unavailable to pay the costs of an administrative law judge and an interagency appeal.

g. The request was not timely filed.

h. The request is not consistent with a specified statute.

**10.306(3)** The commissioner or the commissioner's designee shall issue a written ruling specifying the grounds for its decision within 20 days after a request for an administrative law judge is filed. If the ruling is contingent upon the availability of an administrative law judge with the qualifications identified in subrule 10.306(4), the parties shall be notified at least 10 days prior to hearing if a qualified administrative law judge will not be available.

**10.306(4)** Reserved.

**10.306(5)** Except as provided otherwise by another provision of law, all rulings by an administrative law judge acting as presiding officer are subject to appeal to the agency. A party must seek any available intra-agency appeal in order to exhaust adequate administrative remedies.

**10.306(6)** Unless otherwise provided by law, the commissioner, when reviewing a proposed decision upon intra-agency appeal, shall have the powers of and shall comply with the provisions of this chapter which apply to presiding officers.

**661—10.307(17A) Waiver of procedures.** Unless otherwise precluded by law, the parties in a contested case proceeding may waive any provision of this chapter. However, the department in its discretion may refuse to give effect to such a waiver when it deems the waiver to be inconsistent with the public interest.

**661—10.308(17A) Telephone proceedings.** The presiding officer may resolve preliminary procedural motions by telephone conference in which all parties have an opportunity to participate. Other telephone proceedings may be held with the consent of all parties. The presiding officer will determine the location of the parties and witnesses for telephone hearings. The convenience of the witnesses or parties, as well as the nature of the case, will be considered when location is chosen.

**661—10.309(17A) Disqualification.**

**10.309(1)** A presiding officer or other person shall withdraw from participation in the making of any proposed or final decision in a contested case if that person:

a. Has a personal bias or prejudice concerning a party or a representative of a party;

b. Has personally investigated, prosecuted or advocated in connection with that case, the specific controversy underlying that case, another pending factually related contested case, or a pending factually related controversy that may culminate in a contested case involving the same parties;

c. Is subject to the authority, direction or discretion of any person who has personally investigated, prosecuted or advocated in connection with that contested case, the specific controversy underlying that contested case, or a pending

factually related contested case or controversy involving the same parties;

d. Has acted as counsel to any person who is a private party to that proceeding within the past two years;

e. Has a personal financial interest in the outcome of the case or any other significant personal interest that could be substantially affected by the outcome of the case;

f. Has a spouse or relative within the third degree of relationship that: (1) is a party to the case, or an officer, director or trustee of a party; (2) is a lawyer in the case; (3) is known to have an interest that could be substantially affected by the outcome of the case; or (4) is likely to be a material witness in the case; or

g. Has any other legally sufficient cause to withdraw from participation in the decision making in that case.

**10.309(2)** The term "personally investigated" means taking affirmative steps to interview witnesses directly or to obtain documents or other information directly. The term "personally investigated" does not include general direction and supervision of assigned investigators, unsolicited receipt of information which is relayed to assigned investigators, review of another person's investigative work product in the course of determining whether there is probable cause to initiate a proceeding, or exposure to factual information while performing other agency functions, including fact gathering for purposes other than investigation of the matter which culminates in a contested case. Factual information relevant to the merits of a contested case received by a person who later serves as presiding officer in that case shall be disclosed if required by Iowa Code section 17A.17 as amended by 1998 Iowa Acts, chapter 1202, section 19, and subrules 10.309(3) and 10.323(9).

**10.309(3)** In a situation where a presiding officer or other person knows of information which might reasonably be deemed to be a basis for disqualification and decides voluntary withdrawal is unnecessary, that person shall submit the relevant information for the record by affidavit and shall provide for the record a statement of the reasons for the determination that withdrawal is unnecessary.

**10.309(4)** If a party asserts disqualification on any appropriate ground, including those listed in subrule 10.309(1), the party shall file a motion supported by an affidavit pursuant to 1998 Iowa Acts, chapter 1202, section 19(7). The motion must be filed as soon as practicable after the reason alleged in the motion becomes known to the party.

If, during the course of the hearing, a party first becomes aware of evidence of bias or other grounds for disqualification, the party may move for disqualification but must establish the grounds by the introduction of evidence into the record.

If the presiding officer determines that disqualification is appropriate, the presiding officer or other person shall withdraw. If the presiding officer determines that withdrawal is not required, the presiding officer shall enter an order to that effect. A party asserting disqualification may seek an interlocutory appeal under rule 10.325(17A) and seek a stay under rule 10.329(17A).

**661—10.310(17A) Consolidation—severance.**

**10.310(1)** Consolidation. The presiding officer may consolidate any or all matters at issue in two or more contested case proceedings where: (a) the matters at issue involve common parties or common questions of fact or law; (b) consolidation would expedite and simplify consideration of the issues involved; and (c) consolidation would not adversely affect the rights of any of the parties to those proceedings.

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**10.310(2) Severance.** The presiding officer may, for good cause shown, order any contested case proceedings or portions thereof severed.

**661—10.311(17A) Pleadings.** Formal pleadings are not required in cases initiated by a notice of appeal or a notice of claim. However, the presiding officer may order the parties to file formal pleadings in any case.

**661—10.312(17A) Service and filing of pleadings and other papers.**

**10.312(1) When service required.** Except where otherwise provided by law, every pleading, motion, document, or other paper filed in a contested case proceeding and every paper relating to discovery in such a proceeding shall be served upon each of the parties of record to the proceeding, including the person designated as advocate or prosecutor for the state or the department, simultaneously with their filing. Except for the original notice of hearing and an application for rehearing as provided in Iowa Code section 17A.16(2), the party filing a document is responsible for service on all parties.

**10.312(2) Service—how made.** Service upon a party represented by an attorney shall be made upon the attorney unless otherwise ordered. Service is made by delivery or by mailing a copy to the person's last-known address. Service by mail is complete upon mailing, except where otherwise specifically provided by statute, rule, or order.

**10.312(3) Filing—when required.** After the notice of hearing, all pleadings, motions, documents or other papers in a contested case proceeding shall be filed with the Administrative Services Division, Department of Public Safety, Wallace State Office Building, Des Moines, Iowa 50319. All pleadings, motions, documents or other papers that are required to be served upon a party shall be filed simultaneously with the department.

**10.312(4) Filing—when made.** Except where otherwise provided by law, a document is deemed filed at the time it is delivered to the Administrative Services Division, Department of Public Safety, Wallace State Office Building, Des Moines, Iowa 50319, delivered to an established courier service for immediate delivery to that office, or mailed by first-class mail or state interoffice mail to that office, so long as there is proof of mailing.

**10.312(5) Proof of mailing.** Proof of mailing includes either: a legible United States Postal Service postmark on the envelope, a certificate of service, a notarized affidavit, or a certification in substantially the following form:

I certify under penalty of perjury and pursuant to the laws of Iowa that, on (date of mailing), I mailed copies of (describe document) addressed to the Administrative Services Division, Department of Public Safety, Wallace State Office Building, Des Moines, Iowa 50319, and to the names and addresses of the parties listed below by depositing the same in (a United States post office mailbox with correct postage properly affixed or state interoffice mail).

(Date) \_\_\_\_\_ (Signature) \_\_\_\_\_

**661—10.313(17A) Discovery.**

**10.313(1) Discovery procedures applicable in civil actions** are applicable in contested cases. Unless lengthened or shortened by these rules or by order of the presiding officer, time periods for compliance with discovery shall be as provided in the Iowa Rules of Civil Procedure.

**10.313(2) Any motion relating to discovery shall allege** that the moving party has previously made a good-faith attempt to resolve the discovery issues involved with the op-

posing party. Motions in regard to discovery shall be ruled upon by the presiding officer. Opposing parties shall be afforded the opportunity to respond within ten days of the filing of the motion unless the time is shortened as provided in subrule 10.313(1). The presiding officer may rule on the basis of the written motion and any response, or may order argument on the motion.

**10.313(3) Evidence obtained in discovery may be used in** the contested case proceeding if that evidence would otherwise be admissible in that proceeding.

**661—10.314(17A) Subpoenas.**

**10.314(1) Issuance.**

a. An agency subpoena shall be issued to a party on request. Such a request must be in writing. In the absence of good cause for permitting later action, a request for a subpoena must be received at least three days before the scheduled hearing. The request shall include the name, address, and telephone number of the requesting party.

b. Except to the extent otherwise provided by law, parties are responsible for service of their own subpoenas and payment of witness fees and mileage expenses.

**10.314(2) Motion to quash or modify.** The presiding officer may quash or modify a subpoena for any lawful reason upon motion in accordance with the Iowa Rules of Civil Procedure. A motion to quash or modify a subpoena shall be set for argument promptly.

**661—10.315(17A) Motions.**

**10.315(1) No technical form for motions is required.** However, prehearing motions must be in writing, state the grounds for relief, and state the relief sought.

**10.315(2) Any party may file a written response to a motion** within ten days after the motion is served, unless the time period is extended or shortened by rules of the department or the presiding officer. The presiding officer may consider a failure to respond within the required time period in ruling on a motion.

**10.315(3) The presiding officer may schedule oral argument on any motion.**

**10.315(4) Motions pertaining to the hearing must be filed and served at least ten days prior to the date of hearing unless** there is good cause for permitting later action or the time for such action is lengthened or shortened by administrative rule or an order of the presiding officer.

**661—10.316(17A) Prehearing conference.**

**10.316(1) Any party may request a prehearing conference.** A written request for prehearing conference or an order for prehearing conference on the presiding officer's own motion shall be filed not less than seven days prior to the hearing date. A prehearing conference shall be scheduled not less than three business days prior to the hearing date.

Written notice of the prehearing conference shall be given by the presiding officer to all parties. For good cause the presiding officer may permit variances from this rule.

**10.316(2) Each party shall bring to the prehearing conference:**

a. A final list of the witnesses who the party anticipates will testify at hearing. Witnesses not listed may be excluded from testifying unless there was good cause for the failure to include their names; and

b. A final list of exhibits which the party anticipates will be introduced at hearing. Exhibits other than rebuttal exhibits that are not listed may be excluded from admission into evidence unless there was good cause for the failure to include them.

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c. Witness or exhibit lists may be amended subsequent to the prehearing conference within the time limits established by the presiding officer at the prehearing conference. Any such amendments must be served on all parties.

**10.316(3)** In addition to the requirements of subrule 10.316(2), the parties at a prehearing conference may:

- a. Enter into stipulations of law or fact;
- b. Enter into stipulations on the admissibility of exhibits;
- c. Identify matters which the parties intend to request be officially noticed;
- d. Enter into stipulations for waiver of any provision of law; and
- e. Consider any additional matters which will expedite the hearing.

**10.316(4)** Prehearing conferences shall be conducted by telephone unless otherwise ordered. Parties shall exchange and receive witness and exhibit lists in advance of a telephone prehearing conference.

**661—10.317(17A) Continuances.** Unless otherwise provided, applications for continuances shall be made to the presiding officer.

**10.317(1)** A written application for a continuance shall:

- a. Be made at the earliest possible time and no less than seven days before the hearing except in case of unanticipated emergencies;
- b. State the specific reasons for the request; and
- c. Be signed by the requesting party or the party's representative.

An oral application for a continuance may be made if the presiding officer waives the requirement for a written motion. However, a party making such an oral application for a continuance must confirm that request by written application within five days after the oral request unless that requirement is waived by the presiding officer. No application for continuance shall be made or granted without notice to all parties except in an emergency where notice is not feasible. The department may waive notice of such requests for a particular case or an entire class of cases.

**10.317(2)** In determining whether to grant a continuance, the presiding officer may consider:

- a. Prior continuances;
- b. The interests of all parties;
- c. The likelihood of informal settlement;
- d. The existence of an emergency;
- e. Any objection;
- f. Any applicable time requirements;
- g. The existence of a conflict in the schedules of counsel, parties, or witnesses;
- h. The timeliness of the request; and
- i. Other relevant factors.

The presiding officer may require documentation of any grounds for continuance.

**661—10.318(17A) Withdrawals.** A party requesting a contested case proceeding may withdraw that request prior to the hearing. Unless otherwise provided, a withdrawal shall be with prejudice.

**661—10.319(17A) Intervention.**

**10.319(1)** Motion. A motion for leave to intervene in a contested case proceeding shall state the grounds for the proposed intervention, the position and interest of the proposed intervenor, and the possible impact of intervention on the proceeding. A proposed answer or petition in intervention shall be attached to the motion. Any party may file a response within 14 days of service of the motion to intervene

unless the time period is extended or shortened by the presiding officer.

**10.319(2)** When filed. Motion for leave to intervene shall be filed as early in the proceeding as possible to avoid adverse impact on existing parties or the conduct of the proceeding. Unless otherwise ordered, a motion for leave to intervene shall be filed before the prehearing conference, if any, or at least 20 days before the date scheduled for hearing. Any later motion must contain a statement of good cause for the failure to file in a timely manner. Unless inequitable or unjust, an intervenor shall be bound by any agreement, arrangement, or other matter previously raised in the case. Requests by untimely intervenors for continuances which would delay the proceeding will ordinarily be denied.

**10.319(3)** Grounds for intervention. The movant shall demonstrate that: (a) intervention would not unduly prolong the proceedings or otherwise prejudice the rights of existing parties; (b) the movant is likely to be aggrieved or adversely affected by a final order in the proceeding; and (c) the interests of the movant are not adequately represented by existing parties.

**10.319(4)** Effect of intervention. If appropriate, the presiding officer may order consolidation of the petitions and briefs of different parties whose interests are aligned with each other and limit the number of representatives allowed to participate actively in the proceedings. A person granted leave to intervene is a party to the proceeding. The order granting intervention may restrict the issues that may be raised by the intervenor or otherwise condition the intervenor's participation in the proceeding.

**661—10.320(17A) Hearing procedures.**

**10.320(1)** The presiding officer presides at the hearing, and may rule on motions, require briefs, issue a proposed decision, and issue such orders and rulings as will ensure the orderly conduct of the proceedings.

**10.320(2)** All objections shall be timely made and stated on the record.

**10.320(3)** Parties have the right to participate or to be represented in all hearings or prehearing conferences related to their case. Partnerships, corporations, or associations may be represented by any member, officer, director, or duly authorized agent. Any party may be represented by an attorney or another person authorized by law.

**10.320(4)** Subject to terms and conditions prescribed by the presiding officer, parties have the right to introduce evidence on issues of material fact, cross-examine witnesses present at the hearing as necessary for a full and true disclosure of the facts, present evidence in rebuttal, and submit briefs and engage in oral argument.

**10.320(5)** The presiding officer shall maintain the decorum of the hearing and may refuse to admit or may expel anyone whose conduct is disorderly.

**10.320(6)** Witnesses may be sequestered during the hearing.

**10.320(7)** The presiding officer shall conduct the hearing in the following manner:

- a. The presiding officer shall give an opening statement briefly describing the nature of the proceedings;
- b. The parties shall be given an opportunity to present opening statements;
- c. Parties shall present their cases in the sequence determined by the presiding officer;
- d. Each witness shall be sworn or affirmed by the presiding officer or the court reporter, and be subject to examination and cross-examination. The presiding officer may limit questioning in a manner consistent with law;

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e. When all parties and witnesses have been heard, parties may be given the opportunity to present final arguments.

**661—10.321(17A) Evidence.**

**10.321(1)** The presiding officer shall rule on admissibility of evidence and may, where appropriate, take official notice of facts in accordance with all applicable requirements of law.

**10.321(2)** Stipulation of facts is encouraged. The presiding officer may make a decision based on stipulated facts.

**10.321(3)** Evidence in the proceeding shall be confined to the issues as to which the parties received notice prior to the hearing unless the parties waive their right to such notice or the presiding officer determines that good cause justifies expansion of the issues. If the presiding officer decides to admit evidence on issues outside the scope of the notice over the objection of a party who did not have actual notice of those issues, that party, upon timely request, shall receive a continuance sufficient to amend pleadings and to prepare on the additional issue.

**10.321(4)** The party seeking admission of an exhibit must provide opposing parties with an opportunity to examine the exhibit prior to the ruling on its admissibility. Copies of documents should normally be provided to opposing parties.

All exhibits admitted into evidence shall be appropriately marked and be made part of the record.

**10.321(5)** Any party may object to specific evidence or may request limits on the scope of any examination or cross-examination. Such an objection shall be accompanied by a brief statement of the grounds upon which it is based. The objection, the ruling on the objection, and the reasons for the ruling shall be noted in the record. The presiding officer may rule on the objection at the time it is made or may reserve a ruling until the written decision.

**10.321(6)** Whenever evidence is ruled inadmissible, the party offering that evidence may submit an offer of proof on the record. The party making the offer of proof for excluded oral testimony shall briefly summarize the testimony or, with permission of the presiding officer, present the testimony. If the excluded evidence consists of a document or exhibit, it shall be marked as part of an offer of proof and inserted in the record.

**661—10.322(17A) Default.**

**10.322(1)** If a party fails to appear or participate in a contested case proceeding after proper service of notice, the presiding officer may, if no adjournment is granted, enter a default decision or proceed with the hearing and render a decision in the absence of the party.

**10.322(2)** Where appropriate and not contrary to law, any party may move for default against a party who has requested the contested case proceeding and has failed to file a required pleading or has failed to appear after proper service.

**10.322(3)** Default decisions or decisions rendered on the merits after a party has failed to appear or participate in a contested case proceeding become final agency action unless, within 15 days, or other period of time specified by statute or rule, after the date of notification or mailing of the decision, a motion to vacate is filed and served on all parties or an appeal of a decision on the merits is timely initiated within the time provided by rule 10.327(17A). A motion to vacate must state all facts relied upon by the moving party which establish that good cause existed for that party's failure to appear or participate at the contested case proceeding. Each fact so stated must be substantiated by at least one sworn affidavit of a person with personal knowledge of each such fact, which affidavit(s) must be attached to the motion.

**10.322(4)** The time for further appeal of a decision for which a timely motion to vacate has been filed is stayed pending a decision on the motion to vacate.

**10.322(5)** Properly substantiated and timely filed motions to vacate shall be granted only for good cause shown. The burden of proof as to good cause is on the moving party. Adverse parties shall have ten days, or other time specified by the presiding officer, to respond to a motion to vacate. Adverse parties shall be allowed to conduct discovery as to the issue of good cause and to present evidence on the issue prior to a decision on the motion, if a request to do so is included in that party's response.

**10.322(6)** "Good cause" for purposes of this rule shall have the same meaning as "good cause" for setting aside a default judgment under Iowa Rule of Civil Procedure 236.

**10.322(7)** A decision denying a motion to vacate is subject to further appeal within the time limit allowed for further appeal of a decision on the merits in the contested case proceeding. A decision granting a motion to vacate is subject to interlocutory appeal by the adverse party pursuant to rule 10.325(17A).

**10.322(8)** If a motion to vacate is granted and no timely interlocutory appeal has been taken, the presiding officer shall issue another notice of hearing and the contested case shall proceed accordingly.

**10.322(9)** A default decision may award any relief consistent with the request for relief made in the petition and embraced in its issues but, unless the defaulting party has appeared, it cannot exceed the relief demanded.

**10.322(10)** A default decision may provide either that the default decision is to be stayed pending a timely motion to vacate or that the default decision is to take effect immediately, subject to a request for stay under rule 10.329(17A).

**661—10.323(17A) Ex parte communication.**

**10.323(1)** Prohibited communications. Unless required for the disposition of ex parte matters specifically authorized by statute, following issuance of the notice of hearing, there shall be no communication, directly or indirectly, between the presiding officer and any party or representative of any party or any other person with a direct or indirect interest in such case in connection with any issue of fact or law in the case except upon notice and opportunity for all parties to participate. This does not prohibit persons jointly assigned such tasks from communicating with each other. Nothing in this provision is intended to preclude the presiding officer from communicating with members of the agency or seeking the advice or help of persons other than those with a personal interest in, or those engaged in personally investigating as defined in subrule 10.309(2), prosecuting, or advocating in, either the case under consideration or a pending factually related case involving the same parties as long as those persons do not directly or indirectly communicate to the presiding officer any ex parte communications they have received of a type that the presiding officer would be prohibited from receiving or that furnish, augment, diminish, or modify the evidence in the record.

**10.323(2)** Prohibitions on ex parte communications commence with the issuance of the notice of hearing in a contested case and continue for as long as the case is pending.

**10.323(3)** Written, oral or other forms of communication are "ex parte" if made without notice and opportunity for all parties to participate.

**10.323(4)** To avoid prohibited ex parte communications, notice must be given in a manner reasonably calculated to give all parties a fair opportunity to participate. Notice of written communications shall be provided in compliance

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with rule 10.312(17A) and may be supplemented by telephone, facsimile, electronic mail or other means of notification. Where permitted, oral communications may be initiated through conference telephone call including all parties or their representatives.

**10.323(5)** Persons who jointly act as presiding officer in a pending contested case may communicate with each other without notice or opportunity for parties to participate.

**10.323(6)** The commissioner of public safety or other persons may be present in deliberations or otherwise advise the presiding officer without notice or opportunity for parties to participate as long as they are not disqualified from participating in the making of a proposed or final decision under any provision of law and they comply with subrule 10.323(1).

**10.323(7)** Communications with the presiding officer involving uncontested scheduling or procedural matters do not require notice or opportunity for parties to participate. Parties should notify other parties prior to initiating such contact with the presiding officer when feasible, and shall notify other parties when seeking to continue hearings or other deadlines pursuant to rule 10.317(17A).

**10.323(8)** Disclosure of prohibited communications. A presiding officer who receives a prohibited ex parte communication during the pendency of a contested case must initially determine if the effect of the communication is so prejudicial that the presiding officer should be disqualified. If the presiding officer determines that disqualification is warranted, a copy of any prohibited written communication, all written responses to the communication, a written summary stating the substance of any prohibited oral or other communication not available in written form for disclosure, all responses made, and the identity of each person from whom the presiding officer received a prohibited ex parte communication shall be submitted for inclusion in the record under seal by protective order or disclosed, as determined by the presiding officer. If the presiding officer determines that disqualification is not warranted, such documents shall be submitted for inclusion in the record and served on all parties. Any party desiring to rebut the prohibited communication must be allowed the opportunity to do so upon written request filed within ten days after notice of the communication.

**10.323(9)** Promptly after being assigned to serve as presiding officer at any stage in a contested case proceeding, a presiding officer shall disclose to all parties material factual information received through ex parte communication prior to such assignment unless the factual information has already been or shortly will be disclosed pursuant to Iowa Code section 17A.13(2) or through discovery. Factual information contained in an investigative report or similar document need not be separately disclosed by the presiding officer as long as such documents have been or will shortly be provided to the parties.

**10.323(10)** The presiding officer may render a proposed or final decision imposing appropriate sanctions for violations of this rule including default, a decision against the offending party, censure, or suspension or revocation of the privilege to practice before the agency. Violation of ex parte communication prohibitions by department personnel shall be reported to the Internal Affairs Bureau, Department of Public Safety, Wallace State Office Building, Des Moines, Iowa 50319, for possible sanctions including censure, suspension, dismissal, or other disciplinary action.

**661—10.324(17A) Recording costs.** Upon request, the department shall provide a copy of the whole or any portion of

the record at cost. The cost of preparing a copy of the record or of transcribing the hearing record shall be paid by the requesting party.

Parties who request that a hearing be recorded by certified shorthand reporters rather than by electronic means shall bear the cost of that recordation, unless otherwise provided by law.

**661—10.325(17A) Interlocutory appeals.** Upon written request of a party or on the commissioner's own motion, the commissioner of public safety may review an interlocutory order of the presiding officer. In determining whether to do so, the commissioner shall weigh the extent to which its granting the interlocutory appeal would expedite final resolution of the case and the extent to which review of that interlocutory order by the agency at the time it reviews the proposed decision of the presiding officer would provide an adequate remedy. Any request for interlocutory review must be filed within 14 days of issuance of the challenged order, but no later than the time for compliance with the order or the date of hearing, whichever is first.

**661—10.326(17A) Final decision.**

**10.326(1)** When commissioner of public safety presides over the reception of evidence at the hearing, the commissioner's decision is a final decision.

**10.326(2)** When the commissioner does not preside at the reception of evidence, the presiding officer shall make a proposed decision. The proposed decision becomes the final decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the department within the time provided in rule 10.327(17A).

**661—10.327(17A) Appeals and review.**

**10.327(1)** Appeal by party. Any adversely affected party may appeal a proposed decision to the commissioner of public safety within 30 days after issuance of the proposed decision.

**10.327(2)** Review. The commissioner may initiate review of a proposed decision on the commissioner's own motion at any time within 30 days following the issuance of such a decision.

**10.327(3)** Notice of appeal. An appeal of a proposed decision is initiated by filing a timely notice of appeal with the Administrative Services Division, Department of Public Safety, Wallace State Office Building, Des Moines, Iowa 50319. The notice of appeal must be signed by the appealing party or a representative of that party and contain a certificate of service. The notice shall specify:

- a. The parties initiating the appeal;
- b. The proposed decision or order appealed from;
- c. The specific findings or conclusions to which exception is taken and any other exceptions to the decision or order;
- d. The relief sought;
- e. The grounds for relief.

**10.327(4)** Requests to present additional evidence. A party may request the taking of additional evidence only by establishing that the evidence is material, that good cause existed for the failure to present the evidence at the hearing, and that the party has not waived the right to present the evidence. A written request to present additional evidence must be filed with the notice of appeal or, by a nonappealing party, within 14 days of service of the notice of appeal. The commissioner may remand a case to the presiding officer for further hearing or may preside at the taking of additional evidence.

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**10.327(5) Scheduling.** The department shall issue a schedule for consideration of the appeal.

**10.327(6) Briefs and arguments.** Unless otherwise ordered, within 20 days of the notice of appeal or order for review, each appealing party may file exceptions and briefs. Within 20 days thereafter, any party may file a responsive brief. Briefs shall cite any applicable legal authority and specify relevant portions of the record in that proceeding. Written requests to present oral argument shall be filed with the briefs.

The commissioner may resolve the appeal on the briefs or provide an opportunity for oral argument. The commissioner may shorten or extend the briefing period as appropriate.

**661—10.328(17A) Applications for rehearing.**

**10.328(1) By whom filed.** Any party to a contested case proceeding may file an application for rehearing from a final order.

**10.328(2) Content of application.**

a. The application for rehearing shall state on whose behalf it is filed, the specific grounds for rehearing, and the relief sought. In addition, the application shall state whether the applicant desires reconsideration of all or part of the agency decision on the existing record and whether, on the basis of the grounds enumerated in subrule 10.327(4), the applicant requests an opportunity to submit additional evidence.

b. Substantially state in separate numbered paragraphs the following:

(1) Clear and concise statements of the reasons for requesting a rehearing and each and every error which the party alleges to have been committed during the contested case proceedings;

(2) Clear and concise statements of all relevant facts upon which the party relies;

(3) Refer to any particular statute or statutes and any rule or rules involved;

(4) The signature of the party or that of the representative.

**10.328(3) Time of filing.** The application shall be filed with the Administrative Services Division, Department of Public Safety, Wallace State Office Building, Des Moines, Iowa 50319, within 20 days after issuance of the final decision.

**10.328(4) Notice to other parties.** A copy of the application shall be timely mailed by the applicant to all parties of record not joining therein. If the application does not contain a certificate of service, the department shall serve copies on all parties.

**10.328(5) Disposition.** Any application for a rehearing shall be deemed denied unless the agency grants the application within 20 days after its filing.

**661—10.329(17A) Stays of agency actions.****10.329(1) When available.**

a. Any party to a contested case proceeding may petition the department for a stay of an order issued in that proceeding or for other temporary remedies, pending review by the agency. The petition shall be filed with the notice of appeal and shall state the reasons justifying a stay or other temporary remedy. The commissioner may rule on the stay or authorize the presiding officer to do so.

b. Any party to a contested case proceeding may petition the department for a stay or other temporary remedies pending judicial review of all or part of that proceeding. The petition shall state the reasons justifying a stay or other temporary remedy.

**10.329(2) When granted.** In determining whether to grant a stay, the presiding officer or commissioner shall consider the factors listed in 1998 Iowa Acts, chapter 1202, section 23(5c).

**10.329(3) Vacation.** A stay may be vacated by the issuing authority upon application of the department of public safety or any other party.

**661—10.330(17A) No factual dispute contested cases.** If the parties agree that no dispute of material fact exists as to a matter that would be a contested case if such a dispute of fact existed, the parties may present all relevant admissible evidence either by stipulation or otherwise as agreed by the parties, without necessity for the production of evidence at an evidentiary hearing. If such agreement is reached, a jointly submitted schedule detailing the method and timetable for submission of the record, briefs and oral argument should be submitted to the presiding officer for approval as soon as practicable. If the parties cannot agree, any party may file and serve a motion for summary judgment pursuant to the rules governing such motions.

**661—10.331(17A) Emergency adjudicative proceedings.**

**10.331(1) Necessary emergency action.** To the extent necessary to prevent or avoid immediate danger to the public health, safety, or welfare and, consistent with the Constitution and other provisions of law, the department may issue a written order in compliance with 1998 Iowa Acts, chapter 1202, section 21, to suspend a license in whole or in part, order the cessation of any continuing activity, order affirmative action, or take other action within the jurisdiction of the agency by emergency adjudicative order. Before issuing an emergency adjudicative order the agency shall consider factors including, but not limited to, the following:

a. Whether there has been a sufficient factual investigation to ensure that the department is proceeding on the basis of reliable information;

b. Whether the specific circumstances which pose immediate danger to the public health, safety or welfare have been identified and determined to be continuing;

c. Whether the person required to comply with the emergency adjudicative order may continue to engage in other activities without posing immediate danger to the public health, safety or welfare;

d. Whether imposition of monitoring requirements or other interim safeguards would be sufficient to protect the public health, safety or welfare; and

e. Whether the specific action contemplated by the department is necessary to avoid the immediate danger.

**10.331(2) Issuance of order.**

a. An emergency adjudicative order shall contain findings of fact, conclusions of law, and policy reasons to justify the determination of an immediate danger in the department's decision to take immediate action.

b. The written emergency adjudicative order shall be immediately delivered to persons who are required to comply with the order by utilizing one or more of the following procedures:

(1) Personal delivery;

(2) Certified mail, return receipt requested, to the last address on file with the department;

(3) Certified mail to the last address on file with the department;

(4) First-class mail to the last address on file with the department; or

(5) Fax. Fax may be used as the sole method of delivery if the person required to comply with the order has filed a

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written request that department orders be sent by fax and has provided a fax number for that purpose.

c. To the degree practicable, the department shall select the procedure for providing written notice that best ensures prompt, reliable delivery.

**10.331(3)** Oral notice. Unless the written emergency adjudicative order is provided by personal delivery on the same day that the order issues, the department shall make reasonable immediate efforts to contact by telephone the persons who are required to comply with the order.

**10.331(4)** Completion of proceedings. After the issuance of an emergency adjudicative order, the department shall proceed as quickly as feasible to complete any proceedings that would be required if the matter did not involve an immediate danger.

Issuance of a written emergency adjudicative order shall include notification of the date on which agency proceedings are scheduled for completion. After issuance of an emergency adjudicative order, continuance of further agency proceedings to a later date will be granted only in compelling circumstances upon application in writing.

**661—10.332(17A) Burden of proof.** Unless otherwise provided by law, the burden of proof in all contested case proceedings in which the department is a party shall be on the petitioner.

These rules are intended to implement Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202.

## ARC 8810A

RACING AND GAMING  
COMMISSION[491]

## Notice of Intended Action

Twenty-five interested persons, a governmental subdivision, an agency or association of 25 or more persons may demand an oral presentation hereon as provided in Iowa Code section 17A.4(1)"b."

Notice is also given to the public that the Administrative Rules Review Committee may, on its own motion or on written request by any individual or group, review this proposed action under section 17A.8(6) at a regular or special meeting where the public or interested persons may be heard.

Pursuant to the authority of Iowa Code sections 17A.3 and 99D.7, the Racing and Gaming Commission hereby gives Notice of Intended Action to rescind Chapter 2, "Rule Making and Declaratory Rulings," and adopt a new Chapter 2, "Rule Making and Declaratory Orders," Iowa Administrative Code.

This amendment rescinds the current rules for rule making and declaratory orders and replaces them to comply with legislative changes to Iowa Code chapter 17A.

Any person may make written suggestions or comments on the proposed rules on or before April 13, 1999. Written material should be directed to the Racing and Gaming Commission, 717 E. Court, Suite B, Des Moines, Iowa 50309. Persons who wish to convey their views orally should contact the Commission office at (515)281-7352.

Also, there will be a public hearing on April 13, 1999, at 9 a.m. in the IMTA auditorium located next to the Racing and Gaming Commission Office, 717 E. Court, Suite B, Des Moines, Iowa. Persons may present their views at the public hearing either orally or in writing.

These rules are intended to implement Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202, and chapter 99D.

The following amendment is proposed.

Rescind 491—Chapter 2 and adopt the following new chapter in lieu thereof:

## CHAPTER 2

## RULE MAKING AND DECLARATORY ORDERS

**491—2.1(17A) Applicability.** Except to the extent otherwise expressly provided by statute, all rules adopted by the agency are subject to the provisions of Iowa Code chapter 17A, the Iowa administrative procedure Act, and the provisions of this chapter.

**491—2.2(17A) Advice on possible rules before notice of proposed rule adoption.** In addition to seeking information by other methods, the racing and gaming commission (commission) may, before publication of a Notice of Intended Action under Iowa Code section 17A.4(1)"a," solicit comments from the public on a subject matter of possible rule making by the commission by causing notice to be published in the Iowa Administrative Bulletin of the subject matter and indicating where, when, and how persons may comment.

**491—2.3(17A) Public rule-making docket.**

**2.3(1)** Docket maintained. The commission shall maintain a current public rule-making docket.

**2.3(2)** Anticipated rule making. The rule-making docket shall list each anticipated rule-making proceeding. A rule-making proceeding is deemed "anticipated" from the time a draft of proposed rules is distributed for internal discussion within the commission. For each anticipated rule-making proceeding the docket shall contain a listing of the precise subject matter which may be submitted for consideration by the commission for subsequent proposal under the provisions of Iowa Code section 17A.4(1)"a," the name and address of commission personnel with whom persons may communicate with respect to the matter, and an indication of the present status within the commission of that possible rule. The commission may also include in the docket other subjects upon which public comment is desired.

**2.3(3)** Pending rule-making proceedings. The rule-making docket shall list each pending rule-making proceeding. A rule-making proceeding is pending from the time it is commenced, by publication in the Iowa Administrative Bulletin of a Notice of Intended Action pursuant to Iowa Code section 17A.4(1)"a," to the time it is terminated, by publication of a Notice of Termination in the Iowa Administrative Bulletin or the rule becoming effective. For each rule-making proceeding, the docket shall indicate:

- a. The subject matter of the proposed rule;
- b. A citation to all published notices relating to the proceeding;
- c. Where written submissions on the proposed rule may be inspected;
- d. The time during which written submissions may be made;
- e. The names of persons who have made written requests for an opportunity to make oral presentations on the proposed rule, where those requests may be inspected, and where and when oral presentations may be made;
- f. Whether a written request for the issuance of a regulatory analysis, or a concise statement of reasons, has been filed, and whether such written request, analysis, or statement may be inspected;
- g. The current status of the proposed rule and any commission determinations with respect thereto;
- h. Any known timetable for commission decisions or other action in the proceedings;

## RACING AND GAMING COMMISSION[491](cont'd)

- i. The date of the rule's adoption;
- j. The date of the rule's filing, indexing, and publication;
- k. The date on which the rule will become effective; and
- l. Where the rule-making record may be inspected.

**491—2.4(17A) Notice of proposed rule making.**

**2.4(1) Contents.** At least 35 days before the adoption of a rule the commission shall cause Notice of Intended Action to be published in the *Iowa Administrative Bulletin*. The Notice of Intended Action shall include:

- a. A brief explanation of the purpose of the proposed rule;
- b. The specific legal authority for the proposed rule;
- c. Except to the extent impracticable, the text of the proposed rule;
- d. Where, when, and how persons may present their views on the proposed rule; and
- e. Where, when, and how persons may demand an oral proceeding on the proposed rule if the notice does not already provide for one.

Where inclusion of the complete text of a proposed rule in the Notice of Intended Action is impracticable, the commission shall include in the notice a statement fully describing the specific subject matter of the omitted portion of the text of the proposed rule, the specific issues to be addressed by that omitted text of the proposed rule, and the range of possible choices being considered by the commission for the resolution of each of those issues.

**2.4(2) Incorporation by reference.** A proposed rule may incorporate other materials by reference only if it complies with all of the requirements applicable to the incorporation by reference of other materials in an adopted rule that are contained in subrule 2.12(2) of this chapter.

**2.4(3) Copies of notices.** Persons desiring to receive copies of future Notices of Intended Action by subscription must file with the commission a written request indicating the name and address to which such notices should be sent. The commission will attach the proposed rules to the agenda for the commission meeting in which the rules will be addressed. If the individual desiring a copy of the rules did not receive the rules with the copy of the agenda either through the mail or on the commission web page within seven days after submission of a Notice of Intended Action to the administrative rules coordinator for publication in the *Iowa Administrative Bulletin*, the commission shall mail or electronically transmit a copy of that notice to subscribers who have filed a written request for either mailing or electronic transmittal with the commission for Notices of Intended Action. The written request shall be accompanied by payment of the subscription price which may cover the full cost of the subscription service, including its administrative overhead and the cost of copying and mailing the Notices of Intended Action for a period of one year.

**491—2.5(17A) Public participation.**

**2.5(1) Written comments.** For at least 20 days after publication of the Notice of Intended Action, persons may submit argument, data, and views, in writing, on the proposed rule. Such written submissions should identify the proposed rule to which they relate and should be submitted to the Racing and Gaming Commission, 717 East Court, Suite B, Des Moines, Iowa 50309.

**2.5(2) Oral proceedings.** The commission may, at any time, schedule an oral proceeding on a proposed rule. The commission shall schedule an oral proceeding on a proposed

rule if, within 20 days after the published Notice of Intended Action, a written request for an opportunity to make oral presentations is submitted to the commission by the administrative rule review committee, a governmental subdivision, an agency, an association having not less than 25 members, or at least 25 persons. That request must also contain the following additional information:

- 1. A request by one or more individual persons must be signed by each of them and include the address and telephone number of each of them.
- 2. A request by an association must be signed by an officer or designee of the association and must contain a statement that the association has at least 25 members and the address and telephone number of the person signing that request.
- 3. A request by an agency or governmental subdivision must be signed by an official having authority to act on behalf of the entity and must contain the address and telephone number of the person signing that request.

**2.5(3) Conduct of oral proceedings.**

a. **Applicability.** This subrule applies only to those oral rule-making proceedings in which an opportunity to make oral presentations is authorized or required by Iowa Code section 17A.4(1)"b" as amended by 1998 Iowa Acts, chapter 1202, section 8, or this chapter.

b. **Scheduling and notice.** An oral proceeding on a proposed rule may be held in one or more locations and shall not be held earlier than 20 days after notice of its location and time is published in the *Iowa Administrative Bulletin*. That notice shall also identify the proposed rule by ARC number and citation to the *Iowa Administrative Bulletin*.

c. **Presiding officer.** The commission, a member of the commission, or another person designated by the commission who will be familiar with the substance of the proposed rule, shall preside at the oral proceeding on a proposed rule. If the commission does not preside, the presiding officer shall prepare a memorandum for consideration by the commission summarizing the contents of the presentations made at the oral proceeding unless the commission determines that such a memorandum is unnecessary because the commission will personally listen to or read the entire transcript of the oral proceeding.

d. **Conduct of proceeding.** At an oral proceeding on a proposed rule, persons may make oral statements and make documentary and physical submissions, which may include data, views, comments or arguments concerning the proposed rule. Persons wishing to make oral presentations at such a proceeding are encouraged to notify the commission at least one business day prior to the proceeding and indicate the general subject of their presentations. At the proceeding, those who participate shall indicate their names and addresses, identify any persons or organizations they may represent, and provide any other information relating to their participation deemed appropriate by the presiding officer. Oral proceedings shall be open to the public and shall be recorded by stenographic or electronic means.

(1) At the beginning of the oral proceeding, the presiding officer shall give a brief synopsis of the proposed rule, a statement of the statutory authority for the proposed rule, and the reasons for the commission decision to propose the rule. The presiding officer may place time limitations on individual oral presentations when necessary to ensure the orderly and expeditious conduct of the oral proceeding. To encourage joint oral presentations and to avoid repetition, additional time may be provided for persons whose presentations

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represent the views of other individuals as well as their own views.

(2) Persons making oral presentations are encouraged to avoid restating matters which have already been submitted in writing.

(3) To facilitate the exchange of information, the presiding officer may, where time permits, open the floor to questions or general discussion.

(4) The presiding officer shall have the authority to take any reasonable action necessary for the orderly conduct of the meeting.

(5) Physical and documentary submissions presented by participants in the oral proceeding shall be submitted to the presiding officer. Such submissions become the property of the commission.

(6) The oral proceeding may be continued by the presiding officer to a later time without notice other than by announcement at the hearing.

(7) Participants in an oral proceeding shall not be required to take an oath or to submit to cross-examination. However, the presiding officer in an oral proceeding may question participants and permit the questioning of participants by other participants about any matter relating to that rule-making proceeding, including any prior written submissions made by those participants in that proceeding; but no participant shall be required to answer any questions.

(8) The presiding officer in an oral proceeding may permit rebuttal statements and request the filing of written statements subsequent to the adjournment of the oral presentations.

**2.5(4) Additional information.** In addition to receiving written comments and oral presentations on a proposed rule according to the provisions of this rule, the commission may obtain information concerning a proposed rule through any other lawful means deemed appropriate under the circumstances.

**2.5(5) Accessibility.** The commission shall schedule oral proceedings in rooms accessible to and functional for persons with physical disabilities. Persons who have special requirements should contact the commission at (515)281-7352 in advance to arrange access or other needed services.

#### **491—2.6(17A) Regulatory analysis.**

**2.6(1) Qualified requesters for regulatory analysis—business impact.** The commission shall issue a regulatory analysis of a proposed rule that conforms to the requirements of 1998 Iowa Acts, chapter 1202, section 10(2a) after a proper request from:

- a. The administrative rules review committee,
- b. The administrative rules coordinator.

**2.6(2) Time period for analysis.** Upon receipt of a timely request for a regulatory analysis the commission shall adhere to the time lines described in 1998 Iowa Acts, chapter 1202, section 10(4).

**2.6(3) Contents of request.** A request for a regulatory analysis is made when it is mailed or delivered to the commission. The request shall be in writing and satisfy the requirements of 1998 Iowa Acts, chapter 1202, section 10(1).

**2.6(4) Contents of concise summary.** The contents of the concise summary shall conform to the requirements of 1998 Iowa Acts, chapter 1202, section 10(4,5).

**2.6(5) Publication of a concise summary.** The commission shall make available, to the maximum extent feasible, copies of the published summary in conformance with 1998 Iowa Acts, chapter 1202, section 10(5).

**2.6(6) Regulatory analysis contents—rules review committee or rules coordinator.** When a regulatory analysis is is-

sued in response to a written request from the administrative rules review committee, or the administrative rules coordinator, the regulatory analysis shall conform to the requirements of 1998 Iowa Acts, chapter 1202, section 10(2a), unless a written request expressly waives one or more of the items listed in the section.

#### **491—2.7(17A,25B) Fiscal impact statement.**

**2.7(1) A proposed rule that mandates additional combined expenditures exceeding \$100,000 by all affected political subdivisions or agencies and entities which contract with political subdivisions to provide services must be accompanied by a fiscal impact statement outlining the costs associated with the rule. A fiscal impact statement must satisfy the requirements of Iowa Code section 25B.6.**

**2.7(2) If the commission determines at the time it adopts a rule that the fiscal impact statement upon which the rule is based contains errors, the commission shall, at the same time, issue a corrected fiscal impact statement and publish the correct fiscal impact statement in the Iowa Administrative Bulletin.**

#### **491—2.8(17A) Time and manner of rule adoption.**

**2.8(1) Time of adoption.** The commission shall not adopt a rule until the period for making written submissions and oral presentations has expired. Within 180 days after the later of the publication of the Notice of Intended Action, or the end of oral proceedings thereon, the commission shall adopt a rule pursuant to the rule-making proceeding or terminate the proceeding by publication of a notice to that effect in the Iowa Administrative Bulletin.

**2.8(2) Consideration of public comment.** Before the adoption of a rule, the commission shall consider fully all of the written submissions and oral submissions received in that rule-making proceeding or any memorandum summarizing such oral submissions, and any regulatory analysis or fiscal impact statement issued in that rule-making proceeding.

**2.8(3) Reliance on commission expertise.** Except as otherwise provided by law, the commission may use its own experience, technical competence, specialized knowledge, and judgment in the adoption of a rule.

#### **491—2.9(17A) Variance between adopted rule and published notice of proposed rule adoption.**

**2.9(1) The commission shall not adopt a rule that differs from the rule proposed in the Notice of Intended Action on which the rule is based unless:**

- a. The differences are within the scope of the subject matter announced in the Notice of Intended Action and are in character with the issues raised in that notice; and
- b. The differences are a logical outgrowth of the contents of that Notice of Intended Action and the comments submitted in response thereto; and
- c. The Notice of Intended Action provided fair warning that the outcome of that rule-making proceeding could be the rule in question.

**2.9(2) In determining whether the Notice of Intended Action provided fair warning that the outcome of that rule-making proceeding could be the rule in question, the commission shall consider the following factors:**

- a. The extent to which the person who will be affected by the rule should have understood that the rule-making proceeding on which it is based could affect their interests;
- b. The extent to which the subject matter of the rule or the issues determined by the rule are different from the subject matter or issues contained in the Notice of Intended Action; and

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c. The extent to which the effects of the rule differ from the effects of the proposed rule contained in the Notice of Intended Action.

**2.9(3)** The commission shall commence a rule-making proceeding within 60 days of its receipt of a petition for rule making seeking the amendment or repeal of a rule that differs from the proposed rule contained in the Notice of Intended Action upon which the rule is based, unless the commission finds that the differences between the adopted rule and the proposed rule are so insubstantial as to make such a rule-making proceeding wholly unnecessary. A copy of any such finding and the petition to which it responds shall be sent to petitioner, the administrative rules coordinator, and the administrative rules review committee, within three days of its issuance.

**2.9(4)** Concurrent rule-making proceedings. Nothing in this rule disturbs the discretion of the commission to initiate, concurrently, several different rule-making proceedings on the same subject with several different published Notices of Intended Action.

**491—2.10(17A) Exemption from public rule-making procedures.**

**2.10(1)** Omission of notice and comment. To the extent the commission for good cause finds that public notice and participation are unnecessary, impracticable, or contrary to the public interest in the process of adopting a particular rule, the commission may adopt that rule without publishing advance Notice of Intended Action in the Iowa Administrative Bulletin and without providing for written or oral public submissions prior to its adoption. The commission shall incorporate the required finding and a brief statement of its supporting reasons in each rule adopted in reliance upon this subrule.

**2.10(2)** Public proceedings on rules adopted without them. The commission may, at any time, commence a standard rule-making proceeding for the adoption of a rule that is identical or similar to a rule it adopts in reliance upon subrule 2.10(1). Upon written petition by a governmental subdivision, the administrative rules review committee, an agency, the administrative rules coordinator, an association having not less than 25 members, or at least 25 persons, the commission shall commence a standard rule-making proceeding for any rule specified in the petition that was adopted in reliance upon subrule 2.10(1). Such a petition must be filed within one year of the publication of the specified rule in the Iowa Administrative Bulletin as an adopted rule. The rule-making proceeding on that rule must be commenced within 60 days of the receipt of such a petition. After a standard rule-making proceeding commenced pursuant to this subrule, the commission may either readopt the rule it adopted without benefit of all usual procedures on the basis of subrule 2.10(1), or may take any other lawful action, including the amendment or repeal of the rule in question, with whatever further proceedings are appropriate.

**491—2.11(17A) Concise statement of reasons.**

**2.11(1)** General. When requested by a person, either prior to the adoption of a rule or within 30 days after its publication in the Iowa Administrative Bulletin as an adopted rule, the commission shall issue a concise statement of reasons for the rule. Requests for such a statement must be in writing and be delivered to the Racing and Gaming Commission, 717 East Court, Suite B, Des Moines, Iowa 50309. The request should indicate whether the statement is sought for all or only a specified part of the rule. Requests will be considered made on the date received.

**2.11(2)** Contents. The concise statement of reasons shall contain:

- a. The reasons for adopting the rule;
- b. An indication of any change between the text of the proposed rule contained in the published Notice of Intended Action and the text of the rule as finally adopted, with the reasons for any such change;
- c. The principal reasons urged in the rule-making proceeding for and against the rule, and the commission's reasons for overruling the arguments made against the rule.

**2.11(3)** Time of issuance. After a proper request, the commission shall issue a concise statement of reasons by the later of the time the rule is adopted or 35 days after receipt of the request.

**491—2.12(17A) Contents, style, and form of rule.**

**2.12(1)** Contents. Each rule adopted by the commission shall contain the text of the rule and, in addition:

- a. The date the commission adopted the rule;
- b. A brief explanation of the principal reasons for the rule-making action if such reasons are required by 1998 Iowa Acts, chapter 1202, section 8, or the commission in its discretion decides to include such reasons;
- c. A reference to all rules repealed, amended, or suspended by the rule;
- d. A reference to the specific statutory or other authority authorizing adoption of the rule;
- e. Any findings required by any provision of law as a prerequisite to adoption or effectiveness of the rule;
- f. A brief explanation of the principal reasons for the failure to provide for waivers to the rule if no waiver provision is included and a brief explanation of any waiver or special exceptions provided in the rule if such reasons are required by 1998 Iowa Acts, chapter 1202, section 8, or the commission in its discretion decides to include such reasons; and
- g. The effective date of the rule.

**2.12(2)** Incorporation by reference. The commission may incorporate by reference in a proposed or adopted rule, and without causing publication of the incorporated matter in full, all or any part of a code, standard, rule, or other matter if the commission finds that the incorporation of its text in the commission proposed or adopted rule would be unduly cumbersome, expensive, or otherwise inexpedient. The reference in the commission proposed or adopted rule shall fully indicate the precise subject and the general contents of the incorporated matter and shall state that the proposed or adopted rule does not include any later amendments or editions of the incorporated matter. The commission may incorporate such matter by reference in a proposed or adopted rule only if the commission makes copies of it readily available to the public. The rule shall state how and where copies of the incorporated matter may be obtained at cost from the commission, and how and where copies may be obtained from the agency of the United States, this state, another state, or the organization, association, or persons, originally issuing that matter. The commission shall retain permanently a copy of any materials incorporated by reference in a rule of the commission.

If the commission adopts standards by reference to another publication, it shall provide a copy of the publication containing the standards to the administrative rules coordinator for deposit in the state law library and may make the standards available electronically.

**2.12(3)** References to materials not published in full. When the administrative code editor decides to omit the full text of a proposed or adopted rule because publication of the

## RACING AND GAMING COMMISSION[491](cont'd)

full text would be unduly cumbersome, expensive, or otherwise inexpedient, the commission shall prepare and submit to the administrative code editor for inclusion in the Iowa Administrative Bulletin and Iowa Administrative Code a summary statement describing the specific subject matter of the omitted material. This summary statement shall include the title and a brief description sufficient to inform the public of the specific nature and subject matter of the proposed or adopted rules, and of significant issues involved in these rules. The summary statement shall also describe how a copy of the full text of the proposed or adopted rule, including any unpublished matter and any matter incorporated by reference, may be obtained from the commission. The commission will provide a copy of that full text at the actual cost upon request and shall make copies of the full text available for review at the state law library and may make the standards available electronically.

At the request of the administrative code editor, the commission shall provide a proposed statement explaining why publication of the full text would be unduly cumbersome, expensive, or otherwise inexpedient.

**2.12(4) Style and form.** In preparing its rules, the commission shall follow the uniform numbering system, form, and style prescribed by the administrative rules coordinator.

**491—2.13(17A) Agency rule-making record.**

**2.13(1) Requirement.** The commission shall maintain an official rule-making record for each rule it proposes by publication in the Iowa Administrative Bulletin of a Notice of Intended Action, or adopts. The rule-making record and materials incorporated by reference must be available for public inspection.

**2.13(2) Contents.** The commission rule-making record shall contain:

a. Copies of all publications in the Iowa Administrative Bulletin with respect to the rule or the proceeding upon which the rule is based and any file-stamped copies of commission submissions to the administrative rules coordinator concerning that rule or the proceeding upon which it is based;

b. Copies of any portions of the commission's public rule-making docket containing entries relating to the rule or the proceeding upon which the rule is based;

c. All written petitions, requests, and submissions received by the commission, and all other written materials of a factual nature as distinguished from opinion that are relevant to the merits of the rule and that were created or compiled by the commission and considered by the administrator, in connection with the formulation, proposal, or adoption of the rule or the proceeding upon which the rule is based, except to the extent that the commission is authorized by law to keep them confidential; provided, however, that when any such materials are deleted because they are authorized by law to be kept confidential, the commission shall identify in the record the particular materials deleted and state the reasons for that deletion;

d. Any official transcript of oral presentations made in the proceeding upon which the rule is based or, if not transcribed, the stenographic record or electronic recording of those presentations, and any memorandum prepared by a presiding officer summarizing the contents of those presentations;

e. A copy of any regulatory analysis or fiscal impact statement prepared for the proceeding upon which the rule is based;

f. A copy of the rule and any concise statement of reasons prepared for that rule;

g. All petitions for amendment or repeal or suspension of the rule;

h. A copy of any objection to the issuance of that rule without public notice and participation that was filed pursuant to Iowa code section 17A.4(2) by the administrative rules review committee, the governor, or the attorney general;

i. A copy of any objection to the rule filed by the administrative rules review committee, the governor, or the attorney general pursuant to Iowa Code section 17A.4(4), and any commission response to that objection;

j. A copy of any significant written criticism of the rule, including a summary of any petitions for waiver of the rule; and

k. A copy of any executive order concerning the rule.

**2.13(3) Effect of record.** Except as otherwise required by a provision of law, the commission rule-making record required by this rule need not constitute the exclusive basis for commission action on that rule.

**2.13(4) Maintenance of record.** The commission shall maintain the rule-making record for a period of not less than five years from the later of the date the rule to which it pertains became effective, the date of the Notice of Intended Action, or the date of any written criticism as described in 2.13(2) "g," "h," "i," or "j."

**491—2.14(17A) Filing of rules.** The commission shall file each rule it adopts in the office of the administrative rules coordinator. The filing must be executed as soon after adoption of the rule as is practicable. At the time of filing, each rule must have attached to it any fiscal impact statement and any concise statement of reasons that was issued with respect to that rule, if applicable. If a fiscal impact statement or statement of reasons for that rule was not issued until a time subsequent to the filing of that rule, the note or statement must be attached to the filed rule within five working days after the note or statement is issued. In filing a rule, the commission shall use the standard form prescribed by the administrative rules coordinator.

**491—2.15(17A) Effectiveness of rules prior to publication.**

**2.15(1) Grounds.** The commission may make a rule effective after its filing at any stated time prior to 35 days after its indexing and publication in the Iowa Administrative Bulletin if it finds that a statute so provides, the rule confers a benefit or removes a restriction on some segment of the public, or that the effective date of the rule is necessary to avoid imminent peril to the public health, safety, or welfare. The commission shall incorporate the required finding and a brief statement of its supporting reasons in each rule adopted in reliance upon this subrule.

**2.15(2) Special notice.** When the commission makes a rule effective prior to its indexing and publication in reliance upon the provisions of Iowa Code section 17A.5(2)"b"(3), the commission shall employ all reasonable efforts to make its contents known to the persons who may be affected by that rule prior to the rule's indexing and publication. The term "all reasonable efforts" requires the commission to employ the most effective and prompt means of notice rationally calculated to inform potentially affected parties of the effectiveness of the rule that is justified and practical under the circumstances considering the various alternatives available for this purpose, the comparative costs to the commission of utilizing each of those alternatives, and the harm suffered by affected persons from any lack of notice concerning the contents of the rule prior to its indexing and publication.

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The means that may be used for providing notice of such rules prior to their indexing and publication include, but are not limited to, any one or more of the following means: radio, newspaper, television, signs, mail, telephone, personal notice or electronic means.

A rule made effective prior to its indexing and publication in reliance upon the provisions of Iowa Code section 17A.5(2)"b"(3) shall include in that rule a statement describing the reasonable efforts that will be used to comply with the requirements of subrule 2.15(2).

491—2.16(17A) General statements of policy.

2.16(1) Compilation, indexing, public inspection. The commission shall maintain an official, current, and dated compilation that is indexed by subject, containing all of its general statements of policy within the scope of Iowa Code section 17A.2(10) "a," "c," "f," "g," "h," "k." Each addition to, change in, or deletion from the official compilation must also be dated, indexed, and a record thereof kept. Except for those portions containing rules governed by Iowa Code section 17A.2(7)"f," or otherwise authorized by law to be kept confidential, the compilation must be made available for public inspection and copying.

2.16(2) Enforcement of requirements. A general statement of policy subject to the requirements of this subsection shall not be relied on by the commission to the detriment of any person who does not have actual, timely knowledge of the contents of the statement until the requirements of subrule 2.16(1) are satisfied. This provision is inapplicable to the extent necessary to avoid imminent peril to the public health, safety, or welfare.

491—2.17(17A) Review by commission of rules.

2.17(1) Any interested person, association, agency, or political subdivision may submit a written request to the administrative rules coordinator requesting the commission to conduct a formal review of a specified rule. Upon approval of that request by the administrative rules coordinator, the commission shall conduct a formal review of a specified rule to determine whether a new rule should be adopted instead or the rule should be amended or repealed. The commission may refuse to conduct a review if it has conducted such a review of the specified rule within five years prior to the filing of the written request.

2.17(2) In conducting the formal review, the commission shall prepare within a reasonable time a written report summarizing its findings, its supporting reasons, and any proposed course of action. The report must include a concise statement of the commission's findings regarding the rule's effectiveness in achieving its objectives, including a summary of any available supporting data. The report shall also concisely describe significant written criticisms of the rule received during the previous five years, including a summary of any petitions for waiver of the rule received by the commission or granted by the commission. The report shall describe alternative solutions to resolve the criticisms of the rule, the reasons any were rejected, and any changes made in the rule in response to the criticisms as well as the reasons for the changes. A copy of the commission's report shall be sent to the administrative rules review committee and the administrative rules coordinator. The report must also be available for public inspection.

491—2.18(99D,99F) Petition for rule making. Any interested person or agency may file a petition for rule making with the commission. The petition for rule making shall be filed in the Racing and Gaming Commission Office, 717 East Court, Suite B, Des Moines, Iowa 50309. The petition shall

either be mailed certified, return receipt requested, or may be delivered in person. An additional copy may be provided if the petitioner wishes to retain a file-stamped copy of the petition. The petition may be either typewritten or legibly printed in ink and must substantially conform to the following form:

RACING AND GAMING COMMISSION

717 East Court, Suite B  
Des Moines, Iowa 50309

Petition by (Name of  
Petitioner) for the (adoption,  
amendment, or repeal)  
of rules relating to  
(state subject matter). } PETITION FOR  
RULE MAKING

The petition must provide the following information:

1. A statement of the specific rule-making action sought by the petitioner including the text or a summary of the contents of the proposed rule or amendment to a rule and, if it is a petition to amend or repeal a rule, a citation and the relevant language to the particular portion or portions of the rule proposed to be amended or repealed.
2. A citation to any law deemed relevant to the commission's authority to take the action urged or to the desirability of that action.
3. A brief summary of petitioner's arguments in support of the action urged in the petition.
4. A brief summary of any data supporting the action urged in the petition.
5. The names and addresses of other persons, or a description of any class of persons, known by petitioner to be affected by, or interested in, the proposed action which is the subject of the petition.

Petitioner's signature

2.18(1) Petition signed. The petition must be dated and signed by the petitioner or the petitioner's representative. It must also include the name, mailing address, and telephone number of the petitioner and petitioner's representative and a statement indicating the person to whom communications concerning the petition should be directed.

2.18(2) Deny petition. The commission may deny a petition because it does not substantially conform to the required form.

2.18(3) Procedure after petition is filed. Upon filing of the petition, the administrator shall inspect the petition to ensure substantial compliance with the recommended form. If the petition does not contain the text or substance of the proposed amendment or fails to include copies of any cited statute, rule, or evidence, the administrator may reject the petition and return it to the petitioner along with the reasons for the rejection. Petitioner may then correct the reasons for rejection and refile the petition. A petition in substantial compliance with the recommended form shall be filed and stamped, and copies promptly sent to the commission members for further study.

2.18(4) Commission action. Within 60 days of the filing of a petition, the commission shall meet to consider the petition and shall either grant the petition and commence rule making, or deny the petition and notify the petitioner in writing of the grounds for the denial.

491—2.19(17A) General. Any interested person may solicit oral or written advice from the administrator concerning the application or interpretation of any statute or administrative rule dealing with the racing commission. However, un-

RACING AND GAMING COMMISSION[491](cont'd)

less the request is made pursuant to 1998 Iowa Acts, chapter 1202, section 13, petition for declaratory order, any such advice is not binding upon the commission. Petitioners for a declaratory order must have a real and direct interest in a specific fact situation that may affect their legal rights, duties or responsibilities under statutes or regulations administered by the commission.

**491—2.20(17A) Petition for declaratory order.** Any person may file a petition with the commission for a declaratory order as to the applicability to specified circumstances of a statute, rule, or order within the primary jurisdiction of the commission, at 717 East Court, Suite B, Des Moines, Iowa 50309. A petition is deemed filed when it is received by that office. The commission shall provide the petitioner with a file-stamped copy of the petition if the petitioner provides the commission an extra copy for this purpose. The petition must be typewritten or legibly handwritten in ink and must substantially conform to the following form:

RACING AND GAMING COMMISSION

717 East Court, Suite B  
Des Moines, Iowa 50309

Petition by (Name of Petitioner) }  
for a Declaratory Order on (Cite }  
provisions of law involved). }  
PETITION FOR  
DECLARATORY  
ORDER

The petition must provide the following information:

1. A clear and concise statement of all relevant facts on which the order is requested.
2. A citation and the relevant language of the specific statutes, rules, policies, decisions, or orders, whose applicability is questioned, and any other relevant law.
3. The questions petitioner wants answered, stated clearly and concisely.
4. The answers to the questions desired by the petitioner and a summary of the reasons urged by the petitioner in support of those answers.
5. The reasons for requesting the declaratory order and disclosure of the petitioner's interest in the outcome.
6. A statement indicating whether the petitioner is currently a party to another proceeding involving the questions at issue and whether, to the petitioner's knowledge, those questions have been decided by, are pending determination by, or are under investigation by, any governmental entity.
7. The names and addresses of other persons, or a description of any class of persons, known by petitioner to be affected by, or interested in, the questions presented in the petition.
8. Any request by petitioner for a meeting provided for by 2.26(17A).

The petition must be dated and signed by the petitioner or the petitioner's representative. It must also include the name, mailing address, and telephone number of the petitioner and petitioner's representative and a statement indicating the person to whom communications concerning the petition should be directed.

**491—2.21(17A) Notice of petition.** Within 15 days after receipt of a petition for a declaratory order, the commission shall give notice of the petition to all persons not served by the petitioner pursuant to rule 2.25(17A) to whom notice is required by any provision of law or who have requested notice

of petitions for declaratory orders. The commission may also give notice to any other persons.

**491—2.22(17A,99D,99F) Intervention.**

**2.22(1)** Persons who qualify under any applicable provision of law as an intervenor and who file a petition for intervention within 30 days of the filing of a petition for declaratory order shall be allowed to intervene in a proceeding for a declaratory order.

**2.22(2)** Any person who files a petition for intervention at any time prior to the issuance of an order may be allowed to intervene in a proceeding for a declaratory order at the discretion of the commission.

**2.22(3)** A petition for intervention shall be filed at the Racing and Gaming Commission Office, 717 East Court, Suite B, Des Moines, Iowa 50309. Such a petition is deemed filed when it is received by that office. The commission will provide the petitioner with a file-stamped copy of the petition for intervention if the petitioner provides an extra copy for this purpose. A petition for intervention must be typewritten or legibly handwritten in ink and must substantially conform to the following form:

RACING AND GAMING COMMISSION

717 East Court, Suite B  
Des Moines, Iowa 50319

Petition by (Name of Original }  
Petitioner) for a Declaratory }  
Order on (Cite provisions of }  
law cited in original petition). }  
PETITION FOR  
INTERVENTION

The petition for intervention must provide the following information:

1. Facts supporting the intervenor's standing and qualifications for intervention.
2. A citation and the relevant language of any additional statutes, rules, or orders and any other, additional, relevant law.
3. The answers to the original summary of the reasons urged by the intervenor in support of those answers.
4. Reasons for requesting intervention and disclosure of the intervenor's interest in the outcome.
5. A statement indicating whether the intervenor is currently a party to any proceeding involving the questions at issue and whether, to the intervenor's knowledge, those questions have been decided by, are pending determination by, or are under investigation by, any governmental entity.
6. The names and addresses of any additional persons, or a description of any class of persons, known by intervenor to be affected by, or interested in, the questions presented.
7. Whether the intervenor consents to be bound by the determination of the matters presented in the declaratory order proceeding.

The petition must be dated and signed by the intervenor or the intervenor's representative. It must also include the name, mailing address, and telephone number of the intervenor and intervenor's representative, and a statement indicating the person to whom communications concerning the petition should be directed.

**491—2.23(17A) Briefs.** The petitioner or any intervenor may file a brief in support of the position urged. The commission may request a brief from the petitioner, any intervenor, or any other person concerning the questions raised.

## RACING AND GAMING COMMISSION[491](cont'd)

**491—2.24(17A) Inquiries.** Inquiries concerning the status of a declaratory order proceeding may be made to the Administrator, Racing and Gaming Commission, 717 East Court, Suite B, Des Moines, Iowa 50309.

**491—2.25(17A) Service and filing of petitions and other papers.**

**2.25(1)** When service required. Except where otherwise provided by law, every petition for declaratory order, petition for intervention, brief, or other paper filed in a proceeding for a declaratory order shall be served upon each of the parties of record to the proceeding, and on all other persons identified in the petition for declaratory order or petition for intervention as affected by or interested in the questions presented, simultaneously with their filing. The party filing a document is responsible for service on all parties and other affected or interested persons.

**2.25(2)** Filing—when required. All petitions for declaratory orders, petitions for intervention, briefs, or other papers in a proceeding for a declaratory order shall be filed with the Racing and Gaming Commission Office, 717 East Court, Suite B, Des Moines, Iowa 50309. All petitions, briefs, or other papers that are required to be served upon a party shall be filed simultaneously with the commission.

**491—2.26(17A) Consideration.** Upon request by petitioner, the commission must schedule a brief and informal meeting between the original petitioner, all intervenors, and the commission, a member of the commission, or a member of the staff of the commission, to discuss the questions raised. The commission may solicit comments from any person on the questions raised. Also, comments on the questions raised may be submitted to the commission by any person.

**491—2.27(17A) Action on petition.**

**2.27(1)** Within the time allowed by 1998 Iowa Acts, chapter 1202, section 13(5), after receipt of a petition for a declaratory order, the administrator or designee shall take action on the petition as required by 1998 Iowa Acts, chapter 1202, section 13(5).

**2.27(2)** The date of issuance of an order or of a refusal to issue an order is defined as the date of mailing of a decision or order or date of delivery if service is by other means unless another date is specified in the order.

**491—2.28(17A) Refusal to issue order.**

**2.28(1)** The commission shall not issue a declaratory order where prohibited by 1998 Iowa Acts, chapter 1202, section 13(1), and may refuse to issue a declaratory order on some or all questions raised for the following reasons.

1. The petition does not substantially comply with the required form.

2. The petition does not contain facts sufficient to demonstrate that the petitioner will be aggrieved or adversely affected by the failure of the commission to issue an order.

3. The commission does not have jurisdiction over the questions presented in the petition.

4. The questions presented by the petition are also presented in a current rule making, contested case, or other commission or judicial proceeding, that may definitively resolve them.

5. The questions presented by the petition would more properly be resolved in a different type of proceeding or by another body with jurisdiction over the matter.

6. The facts or questions presented in the petition are unclear, overbroad, insufficient, or otherwise inappropriate as a basis upon which to issue an order.

7. There is no need to issue an order because the questions raised in the petition have been settled due to a change in circumstances.

8. The petition is not based upon facts calculated to aid in the planning of future conduct but is, instead, based solely upon prior conduct in an effort to establish the effect of that conduct or to challenge a commission decision already made.

9. The petition requests a declaratory order that would necessarily determine the legal rights, duties, or responsibilities of other persons who have not joined in the petition, intervened separately, or filed a similar petition and whose position on the questions presented may fairly be presumed to be adverse to that of petitioner.

10. The petitioner requests the commission to determine whether a statute is unconstitutional on its face.

**2.28(2)** A refusal to issue a declaratory order must indicate the specific grounds for the refusal and constitutes final commission action on the petition.

**2.28(3)** Refusal to issue a declaratory order pursuant to this provision does not preclude the filing of a new petition that seeks to eliminate the grounds for the refusal to issue a ruling.

**491—2.29(17A) Contents of declaratory order—effective date.** In addition to the ruling itself, a declaratory order must contain the date of its issuance, the name of petitioner and all intervenors, the specific statutes, rules, policies, decisions, or orders involved, the particular facts upon which it is based, and the reasons for its conclusion. A declaratory order is effective on the date of issuance.

**491—2.30(17A) Copies of orders.** A copy of all orders issued in response to a petition for a declaratory order shall be mailed promptly to the original petitioner and all intervenors.

**491—2.31(17A) Effect of a declaratory order.** A declaratory order has the same status and binding effect as a final order issued in a contested case proceeding. It is binding on the commission, the petitioner, and any intervenors (who consent to be bound) and is applicable only in circumstances where the relevant facts and the law involved are indistinguishable from those on which the order was based. As to all other persons, a declaratory order serves only as precedent and is not binding on the commission. The issuance of a declaratory order constitutes final commission action on the petition.

These rules are intended to implement Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202, and chapters 99D and 99F.

**ARC 8813A**

**REAL ESTATE APPRAISER  
EXAMINING BOARD[193F]**

**Notice of Intended Action**

Twenty-five interested persons, a governmental subdivision, an agency or association of 25 or more persons may demand an oral presentation hereon as provided in Iowa Code section 17A.4(1)"b."

Notice is also given to the public that the Administrative Rules Review Committee may, on its own motion or on written request by any individual or group, review this proposed action under section 17A.8(6) at a regular or special meeting where the public or interested persons may be heard.

Pursuant to the authority of Iowa Code section 543D.5, the Real Estate Appraiser Examining Board hereby gives

REAL ESTATE APPRAISER EXAMINING BOARD[193F](cont'd)

Notice of Intended Action to amend Chapter 1, "Definitions," and Chapter 2, "Organization and Administration," and rescind Chapter 8, "Investigations and Disciplinary Procedures," Iowa Administrative Code, and adopt a new Chapter 8 with the same title.

Chapter 8 is rescinded and a new Chapter 8 is adopted which implements changes to the Uniform Rules on Agency Procedure required by the Administrative Procedure Act in 1998 Iowa Acts, chapter 1202. The amendments to Chapters 1 and 2 include changes to comply with 1998 Iowa Acts, chapter 1202 as well.

Consideration will be given to all written suggestions or comments on the proposed amendments received on or before April 13, 1999. Comments should be addressed to Glenda Loving, Real Estate Appraiser Examining Board, 1918 S.E. Hulsizer, Ankeny, Iowa 50021, or faxed to (515)281-7411. E-mail may be sent to glenda.loving@comm7.state.ia.us.

These amendments are intended to implement Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202, and Iowa Code chapters 272C and 544A.

The following amendments are proposed.

ITEM 1. Amend 193F—1.1(543D) by adopting new definitions in alphabetical order as follows:

"Issuance" means the date of mailing of a decision or order or date of delivery if service is by other means unless another date is specified in the order.

"Proposed decision" means the presiding officer's recommended findings of fact, conclusions of law, decision, and order on a contested case in which the board did not preside.

ITEM 2. Rescind rules 193F—2.12(17A) to 193F—2.18(17A) and adopt in lieu thereof new rules 193F—2.12(17A) to 193F—2.23(17A) as follows:

**193F—2.12(17A) Petition for declaratory order.** Any person may file a petition with the board for a declaratory order as to the applicability to specified circumstances of a statute, rule, or order within the primary jurisdiction of the board at the board's offices. A petition is deemed filed when it is received by that office. The board shall provide the petitioner with a file-stamped copy of the petition if the petitioner provides the board an extra copy for this purpose. The petition must be typewritten or legibly handwritten in ink and must substantially conform to the following form:

REAL ESTATE APPRAISER EXAMINING BOARD

Petition by (Name of Petitioner) for Declaratory Order on (Cite provisions of law involved). } PETITION FOR DECLARATORY ORDER

The petition must provide the following information:

- 1. A clear and concise statement of all relevant facts on which the order is requested.
2. A citation and the relevant language of the specific statutes, rules, policies, decisions, or orders whose applicability is questioned, and any other relevant law.
3. The questions the petitioner wants answered, stated clearly and concisely.
4. The answers to the questions desired by the petitioner and a summary of the reasons urged by the petitioner in support of those answers.
5. The reasons for requesting the declaratory order and disclosure of the petitioner's interest in the outcome.

6. A statement indicating whether the petitioner is currently a party to another proceeding involving the questions at issue and whether, to the petitioner's knowledge, those questions have been directed by, are pending determination by, or are under investigation by, any governmental entity.

7. The names and addresses of other persons, or a description of any class of persons, known by petitioner to be affected by, or interested in, the questions in the petition.

8. Any request by petitioner for a meeting provided for by 2.18(17A). The petition must be dated and signed by the petitioner or the petitioner's representative. It must also include the name, mailing address, and telephone number of the petitioner and petitioner's representative, and a statement indicating the person to whom communications concerning the petition should be directed.

**193F—2.13(17A) Notice of petition.** Within ten days after receipt of a petition for a declaratory order, the board shall give notice of the petition to all persons not served by the petitioner pursuant to rule 2.17(17A) to whom notice is required by any provision of law. The board may also give notice to any other persons.

**193F—2.14(17A) Intervention.**

**2.14(1)** Persons who qualify under any applicable provision of law as an intervenor and who file a petition for intervention within 20 days of the filing of a petition for declaratory order shall be allowed to intervene in a proceeding for a declaratory order.

**2.14(2)** Any person who files a petition for intervention at any time prior to the issuance of an order may be allowed to intervene in a proceeding for a declaratory order at the discretion of the board.

**2.14(3)** A petition for intervention shall be filed at the board's offices. Such a petition is deemed filed when it is received by that office. The board will provide the petitioner with a file-stamped copy of the petition for intervention if the petitioner provides an extra copy for this purpose. A petition for intervention must be typewritten or legibly handwritten in ink and must substantially conform to the following form:

REAL ESTATE APPRAISER EXAMINING BOARD

Petition by (Name of Original Petitioner) for a Declaratory Order on (Cite provisions of law cited in original petition). } PETITION FOR INTERVENTION

The petition for intervention must provide the following information:

- 1. Facts supporting the intervenor's standing and qualifications for intervention.
2. The answers urged by the intervenor to the question or questions presented and a summary of the reasons urged in support of those answers.
3. Reasons for requesting intervention and disclosure of the intervenor's interest in the outcome.
4. A statement indicating whether the intervenor is currently a party to any proceeding involving the questions at issue and whether, to the intervenor's knowledge, those questions have been decided by, are pending determination by, or are under investigation by, any governmental entity.
5. The names and addresses of any additional persons, or a description of any additional class of persons, known by the intervenor to be affected by, or interested in, the questions presented.

## REAL ESTATE APPRAISER EXAMINING BOARD[193F](cont'd)

6. Whether the intervenor consents to be bound by the determination of the matters presented in the declaratory order proceeding.

The petition must be dated and signed by the intervenor or the intervenor's representative. It must also include the name, mailing address, and telephone number of the intervenor and intervenor's representative, and a statement indicating the person to whom communications should be directed.

**193F—2.15(17A) Briefs.** The petitioner or intervenor may file a brief in support of the position urged. The board may request a brief from the petitioner, any intervenor, or any other person concerning the questions raised in the petition.

**193F—2.16(17A) Inquiries.** Inquiries concerning the status of a declaratory order may be made to the executive secretary of the board at the board's offices.

**193F—2.17(17A) Service and filing of petitions and other papers.**

**2.17(1)** When service required. Except where otherwise provided by law, every petition for declaratory order, petition for intervention, brief, or other paper filed in a proceeding for a declaratory order shall be served upon each of the parties of record to the proceeding, and on all other persons identified in the petition for declaratory order or petition for intervention as affected by or interested in the questions presented, simultaneously with its filing. The party filing a document is responsible for service on all parties and other affected or interested persons.

**2.17(2)** Filing—when required. All petitions for declaratory orders, petitions for intervention, briefs, or other papers in a proceeding for a declaratory order shall be filed with the board at the board's offices. All petitions, briefs, or other papers that are required to be served upon a party shall be filed simultaneously with the board.

**2.17(3)** Method of service, time of filing, and proof of mailing. Method of service, time of filing, and proof of mailing shall be as provided by 193F—8.20(17A).

**193F—2.18(17A) Board consideration.** Upon request by petitioner, the board must schedule a brief and informal meeting between the original petitioner, all intervenors, and the board, a member of the board, or a member of the staff of the board to discuss the questions raised. The board may solicit comments from any person on the questions raised. Also, comments on the questions raised may be submitted to the board by any person.

**193F—2.19(17A) Action on petition.**

**2.19(1)** Within the time allowed after receipt of a petition for a declaratory order, the board shall take action on the petition within 30 days after receipt as required by 1998 Iowa Acts, chapter 1202, section 13(5).

**2.19(2)** The date of issuance of an order or of a refusal to issue an order is as defined in 193F—1.1(543D).

**193F—2.20(17A) Refusal to issue order.** The board shall not issue a declaratory order where prohibited by 1998 Iowa Acts, chapter 1202, section 13(1), and may refuse to issue a declaratory order on some or all questions raised for the following reasons:

1. The petition does not substantially comply with the required form.

2. The petition does not contain facts sufficient to demonstrate that the petitioner will be aggrieved or adversely affected by the failure of the board to issue an order.

3. The board does not have jurisdiction over the questions presented in the petition.

4. The questions presented by the petition are also presented in current rule making, contested case, or other board or judicial proceeding that may definitively resolve them.

5. The questions presented by the petition would more properly be resolved in a different type of proceeding or by another body with jurisdiction over the matter.

6. The facts or questions presented in the petition are unclear, overbroad, insufficient, or otherwise inappropriate as a basis upon which to issue an order.

7. There is no need to issue an order because the questions raised in the petition have been settled due to a change in circumstances.

8. The petition is not based upon facts calculated to aid in the planning of future conduct but is, instead, based solely upon prior conduct in an effort to establish the effect of that conduct or to challenge a board decision already made.

9. The petition requests a declaratory order that would necessarily determine the legal rights, duties, or responsibilities of other persons who have not joined in the petition or filed a similar petition and whose position on the questions presented may fairly be presumed to be adverse to that of petitioner.

10. The petitioner requests the board to determine whether a statute is unconstitutional on its face.

**2.20(1)** A refusal to issue a declaratory order must indicate the specific grounds for the refusal and constitutes final board action on the petition.

**2.20(2)** Refusal to issue a declaratory order pursuant to this provision does not preclude the filing of a new petition that seeks to eliminate the grounds for refusal to issue a ruling.

**193F—2.21(17A) Contents of declaratory order—effective date.** In addition to the ruling itself, a declaratory order must contain the date of its issuance, the name of petitioner, intervenors, the specific statutes, rules, policies, decisions, or orders involved, the particular facts upon which it is based, and the reasons for its conclusion. A declaratory order is effective on the date of issuance.

**193F—2.22(17A) Copies of orders.** A copy of all orders issued in response to a petition for a declaratory order shall be mailed promptly to the original petitioner and all intervenors.

**193F—2.23(17A) Effect of a declaratory order.** A declaratory order has the same status and binding effect as a final order in a contested case proceeding. It is binding on the board, the petitioner and any intervenors and is applicable only in circumstances where the relevant facts and the law involved are indistinguishable from those on which the order was based. As to all other persons, a declaratory order serves only as precedent and is not binding on the board. The issuance of a declaratory order constitutes final board action on the petition.

ITEM 3. Rescind 193F—Chapter 8 and adopt the following new chapter in lieu thereof:

CHAPTER 8  
INVESTIGATIONS AND DISCIPLINARY  
PROCEDURES

**193F—8.1(543D,272C) Disciplinary action.** The real estate appraiser examining board has authority in Iowa Code chapters 543D, 17A and 272C to impose discipline for violations of these chapters and the rules promulgated thereunder.

**193F—8.2(543D) Investigation of complaints.** The board shall, upon receipt of a complaint in writing, or may, upon its

## REAL ESTATE APPRAISER EXAMINING BOARD[193F](cont'd)

own motion, pursuant to other evidence received by the board, review and investigate alleged acts or omissions which the board reasonably believes constitute cause under applicable law or administrative rules. In order to determine if probable cause exists for a hearing on a complaint, the investigators designated by the chairperson shall cause an investigation to be made into the allegations of the complaint. If the board determines that the complaint does not present facts which constitute a basis for disciplinary action, the board shall take no further action.

**193F—8.3(543D) Peer investigative committee.** A peer investigative committee may be appointed by the chairperson to investigate a complaint. The committee will consist of one or more certified or licensed real property appraisers registered to practice in Iowa and residing in Iowa. The committee will review and determine the facts of the complaint and make a report to the board in a timely manner.

**193F—8.4(543D) Investigation report.** Upon completion of the investigation, a report containing the position or defense of the registrant shall be prepared by the investigator(s) for the board's consideration to determine what further action is necessary. The board may:

1. Order the matter be further investigated;
2. Allow the registrant who is the subject of the complaint an opportunity to appear before the board for an informal discussion regarding the circumstances of the alleged violation;
3. Determine there is no probable cause to believe a disciplinary violation has occurred, and close the case;
4. Determine there is probable cause to believe that a disciplinary violation has occurred.

**193F—8.5(543D,272C) Informal discussion.** If the board considers it advisable, or if requested by the affected registrant, the board may grant the registrant an opportunity to appear before the board or a committee of the board for a voluntary informal discussion of the facts and circumstances of an alleged violation. The registrant may be represented by legal counsel at the informal discussion. The registrant is not required to attend the informal discussion. By electing to attend, the registrant waives the right to seek disqualification, based upon personal investigation of a board member or staff, from participating in making a contested case decision or acting as a presiding officer in a later contested case proceeding. Because an informal discussion constitutes a part of the board's investigation of a pending disciplinary case, the facts discussed at the informal discussion may be considered by the board in the event the matter proceeds to a contested case hearing and those facts are independently introduced into evidence. The board may seek a consent order or consent agreement at the time of the informal discussion. If the parties agree to a consent order or consent agreement, a statement of charges shall be filed simultaneously with the consent order.

**193F—8.6(543D) Consent order.** The board may negotiate a settlement and enter into a consent order with an appraiser who acknowledges a violation of the statute or rules and agrees to refrain from any further violation, pursuant to Iowa Code section 543D.17. A representative of the board, designated by the chairperson, and a designated staff person or an assistant attorney general may agree to negotiate a settlement. The proposed consent order must be presented to the board for approval and shall be binding if signed by the board chairperson and the respondent. Any board member who participates in negotiation of a consent order is not disquali-

fied from participating in adjudication of the contested case. Consent to negotiation by the respondent constitutes waiver of notice and opportunity to be heard pursuant to Iowa Code section 17A.17 as amended by 1998 Iowa Acts, chapter 1202, section 19, during settlement negotiations. Thereafter, the prosecuting attorney is authorized to discuss informal settlement with the board chair or designee.

**193F—8.7(543D) Consent agreement.** The board, in its discretion and in lieu of prosecuting a first offense of any of the offenses described in Iowa Code section 543D.17, may enter into a consent agreement with a violator which acknowledges the violation and the violator's agreement to refrain from any further violations. A representative of the board, designated by the chairperson, and a designated staff person or an assistant attorney general may agree to negotiate a consent agreement. The proposed consent agreement must be presented to the board for approval and shall be binding if signed by the board chairperson and the violator. Failure to abide by the agreement is grounds for prosecution.

**193F—8.8(543D) Statement of charges.** The statement of charges shall set forth the acts or omissions with which the respondent is charged including the statute(s) and rule(s) which are alleged to have been violated and shall be in sufficient detail to enable the preparation of the respondent's defense.

**193F—8.9(17A) Time requirements.**

**8.9(1)** Time shall be computed as provided in Iowa Code subsection 4.1(34).

**8.9(2)** For good cause, the presiding officer may extend or shorten the time to take any action, except as precluded by statute. Except for good cause stated in the record, before extending or shortening the time to take any action, the presiding officer shall afford all parties an opportunity to be heard or to file written arguments.

**193F—8.10(17A) Requests for contested case proceeding.** Any person claiming an entitlement to a contested case proceeding shall file a written request for such a proceeding within the time specified by the particular rules or statutes governing the subject matter or, in the absence of such law, the time specified in the board action in question.

The request for a contested case proceeding should state the name and address of the requester; identify the specific board action which is disputed and, where the requester is represented by a lawyer, identify the provisions of law or precedent requiring or authorizing the holding of a contested case proceeding in the particular circumstances involved; and include a short and plain statement of the issues of material fact in dispute.

**193F—8.11(543D,272C) Notice of hearing.** The board's notice of hearing shall fix the time and place for hearing and shall contain those items specified in Iowa Code section 17A.12(2). The notice shall also contain the following:

1. A statement of the time, place, and nature of the hearing;
2. A statement of the legal authority and jurisdiction under which the hearing is to be held;
3. A reference to the particular sections of the statutes and rules involved;
4. A short and plain statement of the matters asserted. If the board or other party is unable to state the matters in detail at the time the notice is served, the initial notice may be limited to a statement of the issues involved. Thereafter, upon application, a more definite and detailed statement shall be furnished;

## REAL ESTATE APPRAISER EXAMINING BOARD[193F](cont'd)

5. Identification of all parties including the name, address and telephone number of the person who will act as advocate for the board or the state and identification of parties' counsel where known;

6. Reference to the procedural rules governing conduct of the contested case proceeding;

7. Reference to the procedural rules governing informal settlement;

8. Identification of the presiding officer, if known. If not known, a description of who will serve as presiding officer (i.e., the board, a panel of the board or an administrative law judge from the department of inspections and appeals); and

9. Notification of the time period in which a party may request, pursuant to 1998 Iowa Acts, chapter 1202, section 15(1), and rule 8.14(17A), that the presiding officer be an administrative law judge.

10. A statement requiring the respondent to submit an answer of the type specified in rule 8.12(543D,272C) within 20 days after receipt of the notice of hearing.

**193F—8.12(543D,272C) Form of answer.** The answer shall contain the following information:

1. The name, address and telephone number of the respondent.

2. Specific statements regarding any or all allegations in the complaint which shall be in the form of admissions, denials, explanations, remarks or statements of mitigating circumstances.

3. Any additional facts or information the respondent deems relevant to the complaint and which may be of assistance in the ultimate determination of the case.

**193F—8.13(543D,272C) Legal representation.** Every statement of charges and notice of hearing prepared by the board shall be reviewed and approved by the office of the attorney general which shall be responsible for the legal representation of the public interest in all proceedings before the board. The assistant attorney general assigned to prosecute a contested case before the board shall not represent the board in that case but shall represent the public interest.

**193F—8.14(17A) Presiding officer.**

**8.14(1)** Any party who wishes to request that the presiding officer assigned to render a proposed decision be an administrative law judge employed by the department of inspections and appeals must file a written request within 20 days after service of a notice of hearing which identifies or describes the presiding officer as the board or a panel of the board.

**8.14(2)** The board may deny the request only upon a finding that one or more of the following apply:

a. Neither the board nor any officer of the board under whose authority the contested case is to take place is a named party to the proceeding or a real party in interest to that proceeding.

b. There is a compelling need to expedite issuance of a final decision in order to protect the public health, safety, or welfare.

c. The case involves a disciplinary hearing to be held by the board pursuant to Iowa Code section 272C.6.

d. The case involves significant policy issues of first impression that are inextricably intertwined with the factual issues presented.

e. The demeanor of the witnesses is likely to be dispositive in resolving the disputed factual issues.

f. Funds are unavailable to pay the costs of an administrative law judge and an interboard appeal.

g. The request was not timely filed.

h. The request is not consistent with a specified statute.

**8.14(3)** The board shall issue a written ruling specifying the grounds for its decision within 20 days after a request for an administrative law judge is filed.

**8.14(4)** Except as provided otherwise by another provision of law, all rulings by an administrative law judge acting as presiding officer are subject to appeal to the board. A party must seek any available intra-agency appeal in order to exhaust adequate administrative remedies.

**8.14(5)** Unless otherwise provided by law, agency heads and members of multimembered agency heads, when reviewing a proposed decision upon intra-agency appeal, shall have the powers of and shall comply with the provisions of this chapter which apply to presiding officers.

**193F—8.15(17A) Waiver of procedures.** Unless otherwise precluded by law, the parties in a contested case proceeding may waive any provision of this chapter. However, the board in its discretion may refuse to give effect to such a waiver when it deems the waiver to be inconsistent with the public interest.

**193F—8.16(17A) Telephone proceedings.** The presiding officer may resolve preliminary procedural motions by telephone conference in which all parties have an opportunity to participate. Other telephone proceedings may be held with the consent of all parties. The presiding officer will determine the location of the parties and witnesses for telephone hearings. The convenience of the witnesses or parties, as well as the nature of the case, will be considered when location is chosen.

**193F—8.17(17A) Disqualification.**

**8.17(1)** A presiding officer or other person shall withdraw from participation in the making of any proposed or final decision in a contested case if that person:

a. Has a personal bias or prejudice concerning a party or a representative of a party;

b. Has personally investigated, prosecuted or advocated, in connection with that case, the specific controversy underlying that case, another pending factually related contested case, or a pending factually related controversy that may culminate in a contested case involving the same parties;

c. Is subject to the authority, direction or discretion of any person who has personally investigated, prosecuted or advocated in connection with that contested case, the specific controversy underlying that contested case, or a pending factually related contested case or controversy involving the same parties;

d. Has acted as counsel to any person who is a private party to that proceeding within the past two years;

e. Has a personal financial interest in the outcome of the case or any other significant personal interest that could be substantially affected by the outcome of the case;

f. Has a spouse or relative within the third degree of relationship that (1) is a party to the case, or an officer, director or trustee of a party; (2) is a lawyer in the case; (3) is known to have an interest that could be substantially affected by the outcome of the case; or (4) is likely to be a material witness in the case; or

g. Has any other legally sufficient cause to withdraw from participation in the decision making in that case.

**8.17(2)** The term "personally investigated" means taking affirmative steps to interview witnesses directly or to obtain documents or other information directly. The term "personally investigated" does not include general direction and supervision of assigned investigators, unsolicited receipt of information which is relayed to assigned investigators, review

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of another person's investigative work product in the course of determining whether there is probable cause to initiate a proceeding, or exposure to factual information while performing other board functions, including fact gathering for purposes other than investigation of the matter which culminates in a contested case. Factual information relevant to the merits of a contested case received by a person who later serves as presiding officer in that case shall be disclosed if required by Iowa Code section 17A.17 as amended by 1998 Iowa Acts, chapter 1202, section 19, and subrule 8.32(9).

**8.17(3)** In a situation where a presiding officer or other person knows of information which might reasonably be deemed to be a basis for disqualification and decides voluntary withdrawal is unnecessary, that person shall submit the relevant information for the record by affidavit and shall provide for the record a statement of the reasons for the determination that withdrawal is unnecessary.

**8.17(4)** If a party asserts disqualification on any appropriate ground, including those listed in subrule 8.17(1), the party shall file a motion supported by an affidavit pursuant to Iowa Code section 17A.17 as amended by 1998 Iowa Acts, chapter 1202, section 19(7). The motion must be filed as soon as practicable after the reason alleged in the motion becomes known to the party. If, during the course of the hearing, a party first becomes aware of evidence of bias or other grounds for disqualification, the party may move for disqualification but must establish the grounds by the introduction of evidence into the record.

If the presiding officer determines that disqualification is appropriate, the presiding officer or other person shall withdraw. If the presiding officer determines that withdrawal is not required, the presiding officer shall enter an order to that effect. A party asserting disqualification may seek an interlocutory appeal under rule 8.34(17A) and seek a stay under rule 8.37(17A).

**193F—8.18(17A) Consolidation—severance.**

**8.18(1)** Consolidation. The presiding officer may consolidate any or all matters at issue in two or more contested case proceedings where (a) the matters at issue involve common parties or common questions of fact or law; (b) consolidation would expedite and simplify consideration of the issues involved; and (c) consolidation would not adversely affect the rights of any of the parties to those proceedings.

**8.18(2)** Severance. The presiding officer may, for good cause shown, order any contested case proceedings or portions thereof severed.

**193F—8.19(17A) Amendments.** Any notice of hearing or statement of charges may be amended before a responsive pleading has been filed. Amendments to pleadings after a responsive pleading has been filed and to an answer may be allowed with the consent of the other parties or in the discretion of the presiding officer who may impose terms or grant a continuance.

**193F—8.20(17A) Service and filing of pleadings and other papers.**

**8.20(1)** When service required. Except where otherwise provided by law, every pleading, motion, document, or other paper filed in a contested case proceeding and every paper relating to discovery in such a proceeding shall be served upon each of the parties of record to the proceeding, including the person designated as advocate or prosecutor for the state or the board, simultaneously with their filing. Except for the original notice of hearing and an application for rehearing as provided in Iowa Code section 17A.16(2), the

party filing a document is responsible for service on all parties.

**8.20(2)** Service—how made. Service upon a party represented by an attorney shall be made upon the attorney unless otherwise ordered. Service is made by delivery or by mailing a copy to the person's last-known address. Service by mail is complete upon mailing, except where otherwise specifically provided by statute, rule, or order.

**8.20(3)** Filing—when required. After the notice of hearing, all pleadings, motions, documents or other papers in a contested case proceeding shall be filed with the board. All pleadings, motions, documents or other papers that are required to be served upon a party shall be filed simultaneously with the board.

**8.20(4)** Filing—when made. Except where otherwise provided by law, a document is deemed filed at the time it is delivered to the board, delivered to an established courier service for immediate delivery to that office, or mailed by first-class mail or state interoffice mail to that office, so long as there is proof of mailing.

**8.20(5)** Proof of mailing. Proof of mailing includes either a legible United States Postal Service postmark on the envelope, a certificate of service, a notarized affidavit, or a certification in substantially the following form:

I certify under penalty of perjury and pursuant to the laws of Iowa that, on (date of mailing), I mailed copies of (describe document) addressed to the Real Estate Appraiser Examining Board and to the names and addresses of the parties listed below by depositing the same in (a United States post office mailbox with correct postage properly affixed or state interoffice mail).  
(Date) (Signature)

**193F—8.21(17A) Discovery.**

**8.21(1)** Discovery procedures applicable in civil actions are applicable in contested cases. Unless lengthened or shortened by these rules or by order of the presiding officer, time periods for compliance with discovery shall be as provided in the Iowa Rules of Civil Procedure.

**8.21(2)** Any motion relating to discovery shall allege that the moving party has previously made a good-faith attempt to resolve the discovery issues involved with the opposing party. Motions in regard to discovery shall be ruled upon by the presiding officer. Opposing parties shall be afforded the opportunity to respond within ten days of the filing of the motion unless the time is shortened as provided in subrule 8.21(1). The presiding officer may rule on the basis of the written motion and any response, or may order argument on the motion.

**8.21(3)** Evidence obtained in discovery may be used in the contested case proceeding if that evidence would otherwise be admissible in that proceeding.

**193F—8.22(17A) Subpoenas.** In connection with the investigation of a complaint, the board is authorized by law to subpoena books, papers, records, and any other real evidence, whether or not privileged or confidential under law, to help it determine whether it should institute a contested case proceeding (disciplinary hearing). After service of the notice of hearing under rule 8.11(543D,272C), the following procedures are available to the parties in order to obtain relevant and material evidence:

**8.22(1)** Board subpoenas for books, papers, records, and other real evidence will be issued to a party upon request. Subpoenas for witnesses may also be obtained. The executive secretary shall issue all subpoenas for both parties upon request. The request, which may be verbal or written, must

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specify the documents sought to be obtained and the names of the witnesses whose testimony is sought.

**8.22(2)** The presiding officer may quash or modify a subpoena for any lawful reason upon motion in accordance with the Iowa Rules of Civil Procedure. A motion to quash or modify a subpoena shall be set for argument promptly.

**8.22(3)** In the event of a refusal to obey a subpoena, either party or the board may petition the district court for its enforcement. Upon proper showing, the district court shall order the person to obey the subpoena and, if the person fails to obey the order of the court, the person may be found guilty of contempt of court.

**193F—8.23(17A) Motions.**

**8.23(1)** No technical form for motions is required. However, prehearing motions must be in writing, state the grounds for relief, and state the relief sought.

**8.23(2)** Any party may file a written response to a motion within ten days after the motion is served, unless the time period is extended or shortened by rules of the board or the presiding officer. The presiding officer may consider a failure to respond within the required time period in ruling on a motion.

**8.23(3)** The presiding officer may schedule oral argument on any motion.

**8.23(4)** Motions pertaining to the hearing, except motions for summary judgment, must be filed and served at least five days prior to the date of hearing unless there is good cause for permitting later action or the time for such action is lengthened or shortened by rule of the board or an order of the presiding officer.

**8.23(5)** Motions for summary judgment shall comply with the requirements of Iowa Rule of Civil Procedure 237 and shall be subject to disposition according to the requirements of that rule to the extent such requirements are not inconsistent with the provisions of this rule or any other provision of law governing the procedure in contested cases.

Motions for summary judgment must be filed and served at least 20 days prior to the scheduled hearing date, or other time period determined by the presiding officer. Any party resisting the motion shall file and serve a resistance within 10 days, unless otherwise ordered by the presiding officer, from the date a copy of the motion was served. The time fixed for hearing or nonoral submission shall be not less than 15 days after the filing of the motion, unless a shorter time is ordered by the presiding officer. A summary judgment order rendered on all issues in a contested case is subject to rehearing pursuant to rule 8.36(17A) and appeal pursuant to rule 8.35(17A).

**193F—8.24(17A) Prehearing conference.**

**8.24(1)** Any party may request a prehearing conference. A written request for prehearing conference or an order for prehearing conference on the presiding officer's own motion shall be filed not less than seven days prior to the hearing date. A prehearing conference shall be scheduled not less than three business days prior to the hearing date.

Written notice of the prehearing conference shall be given by the board to all parties. For good cause the presiding officer may permit variances from this rule.

**8.24(2)** Each party shall bring to the prehearing conference:

a. A final list of the witnesses who the party anticipates will testify at hearing. Witnesses not listed may be excluded from testifying unless there was good cause for the failure to include their names; and

b. A final list of exhibits which the party anticipates will be introduced at hearing. Exhibits other than rebuttal exhibits that are not listed may be excluded from admission into evidence unless there was good cause for the failure to include them.

c. Witness or exhibit lists may be amended subsequent to the prehearing conference within the time limits established by the presiding officer at the prehearing conference. Any such amendments must be served on all parties.

**8.24(3)** In addition to the requirements of subrule 8.24(2), the parties at a prehearing conference may:

- a. Enter into stipulations of law or fact;
- b. Enter into stipulations on the admissibility of exhibits;
- c. Identify matters which the parties intend to request be officially noticed;
- d. Enter into stipulations for waiver of any provision of law; and
- e. Consider any additional matters which will expedite the hearing.

**8.24(4)** Prehearing conferences shall be conducted by telephone unless otherwise ordered. Parties shall exchange and receive witness and exhibit lists in advance of a telephone prehearing conference.

**193F—8.25(17A) Continuances.** Unless otherwise provided, applications for continuances shall be made to the presiding officer.

**8.25(1)** A written application for a continuance shall:

- a. Be made at the earliest possible time and no less than seven days before the hearing except in case of unanticipated emergencies;
- b. State the specific reasons for the request; and
- c. Be signed by the requesting party or the party's representative.

An oral application for a continuance may be made if the presiding officer waives the requirement for a written motion. However, a party making such an oral application for a continuance must confirm that request by written application within five days after the oral request unless that requirement is waived by the presiding officer. No application for continuance shall be made or granted without notice to all parties except in an emergency where notice is not feasible. The board may waive notice of such requests for a particular case or an entire class of cases.

**8.25(2)** In determining whether to grant a continuance, the presiding officer may consider:

- a. Prior continuances;
- b. The interests of all parties;
- c. The likelihood of informal settlement;
- d. The existence of an emergency;
- e. Any objection;
- f. Any applicable time requirements;
- g. The existence of a conflict in the schedules of counsel, parties, or witnesses;
- h. The timeliness of the request; and
- i. Other relevant factors.

The presiding officer may require documentation of any grounds for continuance.

**193F—8.26(17A) Withdrawals.** A party requesting a contested case proceeding may withdraw that request prior to the hearing only in accordance with board rules. Unless otherwise provided, a withdrawal shall be with prejudice.

**193F—8.27(17A) Intervention.**

**8.27(1)** Motion. A motion for leave to intervene in a contested case proceeding shall state the grounds for the pro-

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posed intervention, the position and interest of the proposed intervenor, and the possible impact of intervention on the proceeding. A proposed answer or petition in intervention shall be attached to the motion. Any party may file a response within 14 days of service of the motion to intervene unless the time period is extended or shortened by the presiding officer.

**8.27(2)** When filed. Motion for leave to intervene shall be filed as early in the proceeding as possible to avoid adverse impact on existing parties or the conduct of the proceeding. Unless otherwise ordered, a motion for leave to intervene shall be filed before the prehearing conference, if any, or at least 20 days before the date scheduled for hearing. Any later motion must contain a statement of good cause for the failure to file in a timely manner. Unless inequitable or unjust, an intervenor shall be bound by any agreement, arrangement, or other matter previously raised in the case. Requests by untimely intervenors for continuances which would delay the proceeding will ordinarily be denied.

**8.27(3)** Grounds for intervention. The movant shall demonstrate that (a) intervention would not unduly prolong the proceedings or otherwise prejudice the rights of existing parties; (b) the movant is likely to be aggrieved or adversely affected by a final order in the proceeding; and (c) the interests of the movant are not adequately represented by existing parties.

**8.27(4)** Effect of intervention. If appropriate, the presiding officer may order consolidation of the petitions and briefs of different parties whose interests are aligned with each other and limit the number of representatives allowed to participate actively in the proceedings. A person granted leave to intervene is a party to the proceeding. The order granting intervention may restrict the issues that may be raised by the intervenor or otherwise condition the intervenor's participation in the proceeding.

**193F—8.28(543D,272C) Hearings.** A hearing may be conducted before a majority of the board members. An administrative law judge may act as presiding officer to conduct the hearing for the board or a panel of the board. The presiding officer shall be in control of the proceedings and shall have the authority to administer oaths, to admit or exclude testimony or other evidence and shall rule on all motions and objections.

**8.28(1)** Examination of witnesses by the board. The presiding officer and other board members have the right to conduct direct examination of the witnesses at any stage of that witness's testimony.

**8.28(2)** Public hearing. The hearing shall be open to the public unless the registrant or registrant's attorney requests in writing that the hearing be closed to the public.

**8.28(3)** Record of proceedings. Oral proceedings shall be recorded either by mechanical or electrical means or by certified shorthand reporters. Oral proceedings or any part thereof shall be transcribed at the request of any party with the expense of the transcription charged to the requesting party. The recording or stenographic notes of oral proceedings or the transcription shall be filed with and maintained by the board for at least five years from the date of decision.

**8.28(4)** Order of proceedings. Before testimony is presented, the record shall show the identity of any board members present, identity of the administrative law judge, identity of the primary parties and their representatives, and the fact that all testimony is being recorded. Hearings before the board shall generally be conducted in the following order, subject to modification at the discretion of the board.

a. The presiding officer or designated person may read a summary of the charges and answers thereto and other responsive pleadings filed by the respondent prior to the hearing.

b. The assistant attorney general representing the state interest before the board shall make a brief opening statement which will include a summary of charges and the witnesses and documents to support such charges.

c. The respondent(s) shall each be offered the opportunity to make an opening statement, including the names of any witnesses the respondent(s) desires to call in defense. A respondent may elect to make the opening statement just prior to the presentation of evidence by the respondent(s).

d. The presentation of evidence on behalf of the state.

e. A summary, at the close of the evidence on behalf of the state.

f. The presentation of evidence on behalf of the respondent(s).

g. Rebuttal evidence on behalf of the state, if any.

h. Rebuttal evidence on behalf of the respondent(s), if any.

i. Closing arguments first on behalf of the state, then on behalf of the respondent(s), and then on behalf of the state, if any.

**8.28(5)** Immunity. The presiding officer shall have authority to grant immunity from disciplinary action to a witness, as provided by Iowa Code section 272C.6(3), but only upon the unanimous vote of all members of the board hearing the case. The official record of the hearing shall include the reasons for granting the immunity.

**8.28(6)** Evidence. Admissibility of evidence at the hearing shall be governed by Iowa Code section 17A.14. Copies of documents offered as evidence at the hearing shall be provided to opposing parties. Copies may also be furnished to members of the board.

**8.28(7)** Final decision. When four or more members of the board preside over the reception of evidence at the hearing, the decision is a final decision. The final decision of the board shall be filed with the executive secretary. A copy of the decision and order shall immediately be sent by certified mail, return receipt requested, to the registrant's last-known post office address or may be served as in the manner of original notices upon the registrant.

**193F—8.29(543D) Dispensation.** The board shall make findings of fact and conclusions of law and may take one or more of the following actions:

1. Dismiss the charges.

2. Suspend the registrant's registration as authorized by law.

3. Impose civil penalties, the amount which shall be set at the discretion of the board, but which shall not exceed \$1000. Civil penalties may be imposed for any of the disciplinary violations specified in Iowa Code section 543D.17 or for any repeat offenses.

4. Impose a period of probation, either with or without conditions.

5. Require reexamination.

6. Require additional professional education, reeducation, or continuing education.

7. Issue a citation and a warning.

8. Issue a consent order.

**193F—8.30(17A) Evidence.**

**8.30(1)** The presiding officer shall rule on admissibility of evidence and may, where appropriate, take official notice

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of facts in accordance with all applicable requirements of law.

**8.30(2)** Stipulation of facts is encouraged. The presiding officer may make a decision based on stipulated facts.

**8.30(3)** Evidence in the proceeding shall be confined to the issues as to which the parties received notice prior to the hearing unless the parties waive their right to such notice or the presiding officer determines that good cause justifies expansion of the issues. If the presiding officer decides to admit evidence on issues outside the scope of the notice over the objection of a party who did not have actual notice of those issues, that party, upon timely request, shall receive a continuance sufficient to amend pleadings and to prepare on the additional issue.

**8.30(4)** The party seeking admission of an exhibit must provide opposing parties with an opportunity to examine the exhibit prior to the ruling on its admissibility. Copies of documents shall be provided to opposing parties. Copies may also be furnished to members of the board.

All exhibits admitted into evidence shall be appropriately marked and be made part of the record.

**8.30(5)** Any party may object to specific evidence or may request limits on the scope of any examination or cross-examination. Such an objection shall be accompanied by a brief statement of the grounds upon which it is based. The objection, the ruling on the objection, and the reasons for the ruling shall be noted in the record. The presiding officer may rule on the objection at the time it is made or may reserve a ruling until the written decision.

**8.30(6)** Whenever evidence is ruled inadmissible, the party offering that evidence may submit an offer of proof on the record. The party making the offer of proof for excluded oral testimony shall briefly summarize the testimony or, with permission of the presiding officer, present the testimony. If the excluded evidence consists of a document or exhibit, it shall be marked as part of an offer of proof and inserted in the record.

**193F—8.31(17A) Default.**

**8.31(1)** If a party fails to appear or participate in a contested case proceeding after proper service of notice, the presiding officer may, if no adjournment is granted, enter a default decision or proceed with the hearing and render a decision in the absence of the party.

**8.31(2)** Where appropriate and not contrary to law, any party may move for default against a party who has requested the contested case proceeding and has failed to file a required pleading or has failed to appear after proper service.

**8.31(3)** Default decisions or decisions rendered on the merits after a party has failed to appear or participate in a contested case proceeding become final board action unless, within 15 days after the date of notification or mailing of the decision, a motion to vacate is filed and served on all parties or an appeal of a decision on the merits is timely initiated within the time provided by rule 8.35(17A). A motion to vacate must state all facts relied upon by the moving party which establish that good cause existed for that party's failure to appear or participate at the contested case proceeding. Each fact so stated must be substantiated by at least one sworn affidavit of a person with personal knowledge of each such fact, which affidavit(s) must be attached to the motion.

**8.31(4)** The time for further appeal of a decision for which a timely motion to vacate has been filed is stayed pending a decision on the motion to vacate.

**8.31(5)** Properly substantiated and timely filed motions to vacate shall be granted only for good cause shown. The burden of proof as to good cause is on the moving party. Ad-

verse parties shall have ten days to respond to a motion to vacate. Adverse parties shall be allowed to conduct discovery as to the issue of good cause and to present evidence on the issue prior to a decision on the motion, if a request to do so is included in that party's response.

**8.31(6)** "Good cause" for purposes of this rule shall have the same meaning as "good cause" for setting aside a default judgment under Iowa Rule of Civil Procedure 236.

**8.31(7)** A decision denying a motion to vacate is subject to further appeal within the time limit allowed for further appeal of a decision on the merits in the contested case proceeding. A decision granting a motion to vacate is subject to interlocutory appeal by the adverse party pursuant to rule 8.34(17A).

**8.31(8)** If a motion to vacate is granted and no timely interlocutory appeal has been taken, the presiding officer shall issue another notice of hearing and the contested case shall proceed accordingly.

**8.31(9)** A default decision may award any relief consistent with the request for relief made in the petition and embraced in its issues.

**8.31(10)** A default decision may provide either that the default decision is to be stayed pending a timely motion to vacate or that the default decision is to take effect immediately, subject to a request for stay under rule 8.37(17A).

**193F—8.32(17A) Ex parte communication.**

**8.32(1)** Prohibited communications. Unless required for the disposition of ex parte matters specifically authorized by statute, following issuance of the notice of hearing, there shall be no communication, directly or indirectly, between the presiding officer and any party or representative of any party or any other person with a direct or indirect interest in such case in connection with any issue of fact or law in the case except upon notice and opportunity for all parties to participate. This does not prohibit persons jointly assigned such tasks from communicating with each other. Nothing in this provision is intended to preclude the presiding officer from communicating with members of the board or seeking the advice or help of persons other than those with a personal interest in, or those engaged in personally investigating as defined in subrule 8.17(2), prosecuting, or advocating in, either the case under consideration or a pending factually related case involving the same parties as long as those persons do not directly or indirectly communicate to the presiding officer any ex parte communications they have received of a type that the presiding officer would be prohibited from receiving or that furnish, augment, diminish, or modify the evidence in the record.

**8.32(2)** Prohibitions on ex parte communications commence with the issuance of the notice of hearing in a contested case and continue for as long as the case is pending.

**8.32(3)** Written, oral or other forms of communication are ex parte if made without notice and opportunity for all parties to participate.

**8.32(4)** To avoid prohibited ex parte communications notice must be given in a manner reasonably calculated to give all parties a fair opportunity to participate. Notice of written communications shall be provided in compliance with rule 8.20(17A) and may be supplemented by telephone, facsimile, electronic mail or other means of notification. Where permitted, oral communications may be initiated through conference telephone call including all parties or their representatives.

**8.32(5)** Persons who jointly act as presiding officers in a pending contested case may communicate with each other without notice or opportunity for parties to participate.

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**8.32(6)** The executive secretary or other persons may be present in deliberations or otherwise advise the presiding officer without notice or opportunity for parties to participate as long as they are not disqualified from participating in the making of a proposed or final decision under any provision of law and they comply with subrule 8.32(1).

**8.32(7)** Communications with the presiding officer involving uncontested scheduling or procedural matters do not require notice or opportunity for parties to participate. Parties should notify other parties prior to initiating such contact with the presiding officer when feasible, and shall notify other parties when seeking to continue hearings or other deadlines pursuant to rule 8.25(17A).

**8.32(8)** Disclosure of prohibited communications. A presiding officer who receives a prohibited ex parte communication during the pendency of a contested case must initially determine if the effect of the communication is so prejudicial that the presiding officer should be disqualified. If the presiding officer determines that disqualification is warranted, a copy of any prohibited written communication, all written responses to the communication, a written summary stating the substance of any prohibited oral or other communication not available in written form for disclosure, all responses made, and the identity of each person from whom the presiding officer received a prohibited ex parte communication shall be submitted for inclusion in the record under seal by protective order. If the presiding officer determines that disqualification is not warranted, such documents shall be submitted for inclusion in the record and served on all parties. Any party desiring to rebut the prohibited communication must be allowed the opportunity to do so upon written request filed within ten days after notice of the communication.

**8.32(9)** Promptly after being assigned to serve as presiding officer at any stage in a contested case proceeding, a presiding officer shall disclose to all parties material factual information received through ex parte communication prior to such assignment unless the factual information has already been or shortly will be disclosed pursuant to Iowa Code section 17A.13(2) or through discovery. Factual information contained in an investigative report or similar document need not be separately disclosed by the presiding officer as long as such documents have been or will shortly be provided to the parties.

**8.32(10)** The presiding officer may render a proposed or final decision imposing appropriate sanctions for violations of this rule including default, a decision against the offending party, censure, or suspension or revocation of the privilege to practice before the board. Violation of ex parte communication prohibitions by board personnel shall be reported to the division administrator for possible sanctions including censure, suspension, dismissal, or other disciplinary action.

**193F—8.33(17A) Recording costs.** Upon request, the board shall provide a copy of the whole record or any portion of the record at cost. The cost of preparing a copy of the record or of transcribing the hearing record shall be paid by the requesting party.

Parties who request that a hearing be recorded by certified shorthand reporters rather than by electronic means shall bear the cost of that recordation, unless otherwise provided by law.

**193F—8.34(17A) Interlocutory appeals.** Upon written request of a party or on its own motion, the board may review an interlocutory order of the presiding officer. In determining

whether to do so, the board shall weigh the extent to which its granting the interlocutory appeal would expedite final resolution of the case and the extent to which review of that interlocutory order by the board at the time it reviews the proposed decision of the presiding officer would provide an adequate remedy. Any request for interlocutory review must be filed within 14 days of issuance of the challenged order, but no later than the date for compliance with the order or the date of hearing, whichever is earlier.

**193F—8.35(17A) Appeals and review.**

**8.35(1)** Appeal by party. Any adversely affected party may appeal a proposed decision to the board within 30 days after issuance of the proposed decision.

**8.35(2)** Review. The board may initiate review of a proposed decision on its motion at any time within 30 days following the issuance of such a decision.

**8.35(3)** Notice of appeal. An appeal of a proposed decision is initiated by filing a timely notice of appeal with the board. The notice of appeal must be signed by the appealing party or a representative of that party and contain a certificate of service. The notice shall specify:

- a. The parties initiating the appeal;
- b. The proposed decision or order which is being appealed;
- c. The specific findings or conclusions to which exception is taken and any other exceptions to the decision or order;
- d. The relief sought;
- e. The grounds for relief.

**8.35(4)** Requests to present additional evidence. A party may request the taking of additional evidence only by establishing that the evidence is material, that good cause existed for the failure to present the evidence at the hearing, and that the party has not waived the right to present the evidence. A written request to present additional evidence must be filed with the notice of appeal or, by a nonappealing party, within 14 days of service of the notice of appeal. The board may remand a case to the presiding officer for further hearing or may itself preside at the taking of additional evidence.

**8.35(5)** Scheduling. The board shall issue a schedule for consideration of the appeal.

**8.35(6)** Briefs and arguments. Unless otherwise ordered, within 20 days of the notice of appeal or order for review, each appealing party may file exceptions and briefs. Within 20 days thereafter, any party may file a responsive brief. Briefs shall cite any applicable legal authority and specify relevant portions of the record in that proceeding. Written requests to present oral argument shall be filed with the briefs. The board may resolve the appeal on the briefs or provide an opportunity for oral argument. The board may shorten or extend the briefing period as appropriate.

**193F—8.36(17A) Applications for rehearing.**

**8.36(1)** By whom filed. Any party to a contested case proceeding may file an application for rehearing from a final order.

**8.36(2)** Content of application. The application for rehearing shall state on whose behalf it is filed, the specific grounds for rehearing, and the relief sought. In addition, the application shall state whether the applicant desires reconsideration of all or part of the board decision on the existing record and whether, on the basis of the grounds enumerated in subrule 8.35(4), the applicant requests an opportunity to submit additional evidence.

**8.36(3)** Time of filing. The application shall be filed with the board within 20 days after issuance of the final decision.

## REAL ESTATE APPRAISER EXAMINING BOARD[193F](cont'd)

**8.36(4) Notice to other parties.** A copy of the application shall be timely mailed by the applicant to all parties of record not joining therein. If the application does not contain a certificate of service, the board shall serve copies of the certificate of service on all parties.

**8.36(5) Disposition.** Any application for a rehearing shall be deemed denied unless the board grants the application within 20 days after its filing.

**193F—8.37(17A) Stays of board actions.****8.37(1) When available.**

a. Any party to a contested case proceeding may petition the board for a stay of an order issued in that proceeding or for other temporary remedies, pending review by the board. The petition shall be filed with the notice of appeal and shall state the reasons justifying a stay or other temporary remedy. The board may rule on the stay or authorize the presiding officer to do so.

b. Any party to a contested case proceeding may petition the board for a stay or other temporary remedies, pending judicial review of all or part of that proceeding. The petition shall state the reasons justifying a stay or other temporary remedy.

**8.37(2) When granted.** In determining whether to grant a stay, the presiding officer or board shall consider the factors listed in 1998 Iowa Acts, chapter 1202, section 23(5c).

**8.37(3) Vacation.** A stay may be vacated by the issuing authority upon application of the board or any other party.

**193F—8.38(17A) No factual dispute contested cases.** If the parties agree that no dispute of material fact exists as to a matter that would be a contested case if such a dispute of fact existed, the parties may present all relevant admissible evidence either by stipulation or otherwise as agreed by the parties, without necessity for the production of evidence at an evidentiary hearing. If such agreement is reached, a jointly submitted schedule detailing the method and timetable for submission of the record, briefs and oral argument should be submitted to the presiding officer for approval as soon as practicable. If the parties cannot agree, any party may file and serve a motion for summary judgment pursuant to the rules governing such motions.

**193F—8.39 (17A) Emergency adjudicative proceedings.**

**8.39(1) Necessary emergency action.** To the extent necessary to prevent or avoid immediate danger to the public health, safety or welfare, and consistent with the United States Constitution and Iowa Constitution and other provisions of law, the board may issue a written order in compliance with 1998 Iowa Acts, chapter 1202, section 21, to suspend a license in whole or in part, order the cessation of any continuing activity, order affirmative action, or take other action within the jurisdiction of the board by emergency adjudicative order. Before issuing an emergency adjudicative order, the board shall consider factors including, but not limited to, the following:

a. Whether there has been a sufficient factual investigation to ensure that the board is proceeding on the basis of reliable information;

b. Whether the specific circumstances which pose immediate danger to the public health, safety or welfare have been identified and determined to be continuing;

c. Whether the person required to comply with the emergency adjudicative order may continue to engage in other activities without posing immediate danger to the public health, safety or welfare;

d. Whether imposition of monitoring requirements or other interim safeguards would be sufficient to protect the public health, safety or welfare; and

e. Whether the specific action contemplated by the board is necessary to avoid the immediate danger.

**8.39(2) Issuance of order.**

a. An emergency adjudicative order shall contain findings of fact, conclusions of law, and policy reasons to justify the determination of an immediate danger in the board's decision to take immediate action.

b. The written emergency adjudicative order shall be immediately delivered to persons who are required to comply with the order by utilizing one or more of the following procedures:

(1) Personal delivery;

(2) Certified mail, return receipt requested, to the last address on file with the board;

(3) Certified mail to the last address on file with the board;

(4) First-class mail to the last address on file with the board; or

(5) Fax. Fax may be used as the sole method of delivery if the person required to comply with the order has filed a written request that board orders be sent by fax and has provided a fax number for that purpose.

c. To the degree practicable, the board shall select the procedure for providing written notice that best ensures prompt, reliable delivery.

**8.39(3) Oral notice.** Unless the written emergency adjudicative order is provided by personal delivery on the same day that the order issues, the board shall make reasonable immediate efforts to contact by telephone the persons who are required to comply with the order.

**8.39(4) Completion of proceedings.** After the issuance of an emergency adjudicative order, the board shall proceed as quickly as feasible to complete any proceedings that would be required if the matter did not involve an immediate danger.

Issuance of a written emergency adjudicative order shall include notification of the date on which board proceedings are scheduled for completion. After issuance of an emergency adjudicative order, continuance of further board proceedings to a later date will be granted only in compelling circumstances upon application in writing.

**193F—8.40(543D,272C) Judicial review.** Judicial review of the board's decision may be sought in accordance with the terms of Iowa Code chapter 17A.

**193F—8.41(543D,272C) Reinstatement.** Any person whose registration has been revoked or suspended by the board may apply to the board for reinstatement in accordance with the terms of the order of revocation or suspension.

**8.41(1)** If the order of revocation or suspension did not establish terms upon which reinstatement might occur, or if the registration was voluntarily surrendered, an initial application for reinstatement may not be made until one year has elapsed from the date of the order or the date of voluntary surrender.

**8.41(2)** All proceedings for reinstatement shall be initiated by the respondent who shall file with the board an application for reinstatement of the respondent's registration. Such application shall be docketed in the original case in which the registration was revoked, suspended, or relinquished. All proceedings upon the petition for reinstatement, including the matters preliminary and ancillary thereto, shall

## REAL ESTATE APPRAISER EXAMINING BOARD[193F](cont'd)

be subject to the same rules of procedure as other cases before the board.

**8.41(3)** An application for reinstatement shall allege facts which, if established, will be sufficient to enable the board to determine that the basis of revocation or suspension of the respondent's registration no longer exists and that it will be in the public interest for the registration to be reinstated. The burden of proof to establish such facts shall be on the respondent.

**8.41(4)** An order of reinstatement shall be based upon a decision which incorporates findings of fact and conclusions of law and must be based upon the affirmative vote of not fewer than five members of the board. This order will be published as provided for in rule 8.42(543D,272C).

**193F—8.42(543D,272C) Publication of decisions.** Final decisions of the board relating to disciplinary actions, including consent agreements and consent orders, are public documents, are available to the public, shall be published in the professional licensing division's newsletter and may be transmitted to the appropriate professional association(s), other states, and news media.

**193F—8.43(543D,272C) Hearing on license denial.** If the board, upon receipt of a complete and proper application for initial registration or reciprocal registration, accompanied by the proper fee, shall deny registration to the applicant, the executive secretary shall send written notice to the applicant by regular first-class mail identifying the basis for denial.

**8.43(1)** An applicant denied registration who desires to contest the denial must request a hearing before the board within 30 days of the date the notice of denial is mailed. A request for a hearing must be in writing and is deemed made on the date of the United States Postal Service postmark or the date of personal service. The request for hearing shall specify the grounds under which the applicant contends that the board erred in denying registration. If a request for hearing is timely made, the board shall issue notice of hearing and conduct a contested case hearing.

**8.43(2)** Hearings on registration denial shall be open to the public. The burden of presenting evidence and information or documents to support the applicant's position shall be the responsibility of the applicant.

**8.43(3)** The board, after a hearing on registration denial, may grant or deny the application for registration. If denied, the board shall state the reasons for denial of the license and may state conditions under which the application for registration could be granted, if applicable.

**8.43(4)** The notice of registration denial, request for hearing, notice of hearing, and order are open records available for inspection and copying in accordance with Iowa Code chapter 22. Copies may be provided to the media, the appraisal subcommittee, and other persons or entities.

**8.43(5)** Judicial review of a final order denying registration may be sought in accordance with the provisions of Iowa Code section 17A.19 as amended by 1998 Iowa Acts, chapter 1202, which are applicable to judicial review of any agency's final decision in a contested case.

**193F—8.44(543D,272C) Recovery of hearing fees and expenses.** The board may assess the real estate appraiser certain fees and expenses relating to a disciplinary hearing, only if the board finds that the real estate appraiser did violate Iowa Code chapter 543D and rules of the real estate appraiser examining board.

**8.44(1)** The board may assess an amount up to the following costs under this rule:

a. For conducting a disciplinary hearing, an amount not to exceed \$75.

b. All applicable costs involved in the transcript including, but not limited to, the services of the court reporter at the hearing, transcription, duplication, and postage or delivery costs.

c. All normally accepted witness expenses and fees for a hearing or the taking of depositions. This shall include, but not be limited to, the cost of an expert witness and the cost involved in telephone testimony.

d. All normally applicable costs involved in depositions including, but not limited to, the services of the court reporter recording the deposition, transcription, duplication, and postage or delivery costs.

e. The board, at its discretion, may assess an appropriate amount up to but not exceeding the \$75 fee established by this subrule and the actual acceptable costs, fees, and expenses involved.

**8.44(2)** Fees, costs, and expenses assessed pursuant to this rule shall be calculated and may be entered into the disciplinary order specifying the amount to be reimbursed and the time period in which the amount assessed must be paid by the real estate appraiser.

a. When it is impractical or not possible to include the assessment and time period in the disciplinary order in a timely manner, or if the expenditures occur after the disciplinary order, the board, by a majority vote of the members present, may assess the amount to be reimbursed and the time period in which payment is to be made by the real estate appraiser.

b. If the assessment and the time period are not included in the disciplinary order, the board shall have to the end of the sixth month after the date the state of Iowa paid the expenditures to assess the real estate appraiser for such expenditure.

**8.44(3)** Fees, costs, and expenses assessed by the board pursuant to this rule shall be allocated to the expenditure category in which the disciplinary procedure of hearing was incurred. The fees, costs, and expenses shall be considered repayment receipts as defined in Iowa Code section 8.2.

**8.44(4)** The failure to comply with payment of the assessed costs, fees, and expenses within the time specified by the board shall be considered prima facie evidence of a violation of Iowa Code chapter 543D. However, no action may be taken against the real estate appraiser without a hearing as provided in this chapter.

**193F—8.45(252J) Certificates of noncompliance.** The board shall suspend or revoke a certificate of registration upon the receipt of a certificate of noncompliance from the child support recovery unit of the department of human services according to the procedures in Iowa Code chapter 252J. In addition to the procedures set forth in chapter 252J, this rule shall apply.

**8.45(1)** The notice required by Iowa Code section 252J.8 shall be served upon the registrant by restricted certified mail, return receipt requested, or personal service in accordance with Rule of Civil Procedure 56.1. Alternatively, the registrant may accept service personally or through authorized counsel.

**8.45(2)** The effective date of revocation or suspension of a certificate of registration, as specified in the notice required by Iowa Code section 252J.8, shall be 60 days following service of the notice upon the registrant.

**8.45(3)** The board's executive secretary is authorized to prepare and serve the notice required by Iowa Code section 252J.8 and is directed to notify the registrant that the certificate of registration will be suspended, unless the registration

## REAL ESTATE APPRAISER EXAMINING BOARD[193F](cont'd)

is already suspended on other grounds. In the event a registration is on suspension, the executive secretary shall notify the registrant of the board's intent to revoke the certificate of registration.

**8.45(4)** Registrants shall keep the board informed of all court actions, and all child support recovery unit actions taken under or in connection with Iowa Code chapter 252J, and shall provide the board copies, within seven days of filing or issuance, of all applications filed with the district court pursuant to Iowa Code section 252J.9, all court orders entered in such actions, and withdrawals of certificates of noncompliance by the child support recovery unit.

**8.45(5)** All board fees for license renewal or reinstatement must be paid by registrants before a certificate of registration will be renewed or reinstated after the board has suspended or revoked a license pursuant to Iowa Code chapter 252J.

**8.45(6)** In the event a registrant files a timely district court action following service of a board notice pursuant to Iowa Code sections 252J.8 and 252J.9, the board shall continue with the intended action described in the notice upon the receipt of a court order lifting the stay, dismissing the action, or otherwise directing the board to proceed. For purposes of determining the effective date of suspension or revocation of a certificate of registration, the board shall count the number of days before the action was filed and the number of days after the action was disposed of by the court.

**8.45(7)** The board shall notify the registrant in writing through regular first-class mail, or such other means as the board deems appropriate in the circumstances, within 10 days of the effective date of the suspension or revocation of a certificate of registration, and shall similarly notify the registrant or applicant when the certificate of registration is issued or renewed following the board's receipt of a withdrawal of the certificate of noncompliance.

**193F—8.46(261) Suspension or revocation of a certificate of registration — student loan.** The board shall suspend or revoke a certificate of registration upon receipt of a certificate of noncompliance from the college student aid commission according to the procedures set forth in Iowa Code section 261.126. In addition to those procedures, this rule shall apply.

**8.46(1)** The notice required by Iowa Code section 261.126 shall be served by restricted certified mail, return receipt requested, or by personal service in accordance with the Iowa Rules of Civil Procedure. Alternatively, the registrant may accept service personally or through authorized counsel.

**8.46(2)** The effective date of revocation or suspension of a certificate of registration, as specified in the notice required by Iowa Code section 261.126, shall be 60 days following service of the notice upon the registrant.

**8.46(3)** The board's executive secretary is authorized to prepare and serve the notice required by Iowa Code section 261.126, and is directed to notify the licensee that the certificate of registration will be suspended, unless the certificate of registration is already suspended on other grounds. In the event a certificate of registration is on suspension, the executive secretary shall notify the registrant of the board's intention to revoke the certificate of licensure.

**8.46(4)** Registrants shall keep the board informed of all court actions and all college student aid commission actions taken under or in connection with Iowa Code chapter 261 and shall provide the board copies, within seven days of filing or issuance, of all applications filed with the district court pursuant to Iowa Code section 261.127, all court orders en-

tered in such actions, and withdrawals of certificates of non-compliance by the college student aid commission.

**8.46(5)** All board fees required for registration renewal or registration reinstatement must be paid by registrants and all continuing education requirements must be met before a certificate of registration will be renewed or reinstated after the board has suspended or revoked a license pursuant to Iowa Code chapter 261.

**8.46(6)** In the event a registrant timely files a district court action following service of a board notice pursuant to Iowa Code sections 261.126 and 261.127, the board shall continue with the intended action described in the notice upon the receipt of a court order lifting the stay, dismissing the action, or otherwise directing the board to proceed. For purposes of determining the effective date of the denial of the issuance or renewal of a certificate of registration, the board shall count the number of days before the action was filed and the number of days after the action was disposed of by the court.

**8.46(7)** The board shall notify the registrant in writing through regular first-class mail, or such other means as the board deems appropriate in the circumstances, within ten days of the effective date of the suspension or revocation of a certificate of registration, and shall similarly notify the registrant when the certificate of registration is reinstated following the board's receipt of a withdrawal of the certificate of noncompliance.

These rules are intended to implement Iowa Code chapters 17A, 252J, 272C, and 543D and Iowa Code sections 261.126 and 261.127.

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## REAL ESTATE COMMISSION[193E]

## Notice of Intended Action

Twenty-five interested persons, a governmental subdivision, an agency or association of 25 or more persons may demand an oral presentation hereon as provided in Iowa Code section 17A.4(1)“b.”

Notice is also given to the public that the Administrative Rules Review Committee may, on its own motion or on written request by any individual or group, review this proposed action under section 17A.8(6) at a regular or special meeting where the public or interested persons may be heard.

Pursuant to the authority of Iowa Code section 543B.9, the Real Estate Commission hereby gives Notice of Intended Action to amend Chapter 1, “Business Conduct”; rescind Chapter 4, “Discipline and Hearing Procedure,” and Chapter 7, “Declaratory Rulings”; and adopt a new Chapter 4, “Investigations and Disciplinary Procedures,” and a new Chapter 7, “Declaratory Orders,” Iowa Administrative Code.

The amendments to Chapter 1 add new subrules to rules 193E—1.23(543B) and 1.42(543B) to clarify that licensees that are not a party to the listing agreement or brokerage agreement are prohibited from interfering with contracts between other licensees and the public.

Chapter 4 is rescinded and new Chapter 4 is adopted which implements changes to Uniform Rules on Agency Procedure to comply with 1998 Iowa Acts, chapter 1202.

Chapter 7 is rescinded and new Chapter 7 is adopted which implements changes to Uniform Rules on Agency Procedure as required by the Iowa Administrative Procedure Act in 1998 Iowa Acts, chapter 1202.

Consideration will be given to all written suggestions or comments on the proposed amendments received on or before April 13, 1999. Comments should be addressed to Rog-

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er L. Hansen, Executive Secretary, Real Estate Commission, 1918 S.E. Hulsizer, Ankeny, Iowa 50021, or faxed to (515)281-7411. E-mail may be sent to rhansen@max.state.ia.us.

A public hearing will be held on April 13, 1999, at 9 a.m. in the Professional Licensing Conference Room, Second Floor, Department of Commerce Building, 1918 S.E. Hulsizer, Ankeny, Iowa.

These amendments are intended to implement Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202, and Iowa Code chapters 272C and 543B.

The following amendments are proposed.

ITEM 1. Amend rule 193E—1.23(543B) by adopting the following **new** subrules:

**1.23(5)** A real estate licensee shall not induce another to seek to alter, modify, or change another licensee's fee or commission for real estate brokerage services without that licensee's prior written consent.

**1.23(6)** Any commission or fee in any listing engagement is fully negotiable among the parties to that listing agreement. Once the parties to a listing agreement have agreed to a commission or fee, no licensee other than a party to listing agreement shall attempt to alter, modify, or change or induce another person to alter, modify or change a commission or fee that has previously been agreed upon without the prior written consent of the parties to that listing agreement.

ITEM 2. Amend rule 193E—1.42(543B) by adopting the following **new** subrules:

**1.42(10)** Any commission or fee in any brokerage engagement is fully negotiable among the parties to that brokerage agreement. Once the parties to a brokerage agreement have agreed to a commission or fee, no licensee other than a party to that brokerage agreement shall attempt to alter, modify, or change or induce another person to alter, modify or change a commission or fee that has previously been agreed upon without the prior written consent of the parties to that brokerage agreement.

**1.42(11)** A real estate licensee shall not induce another to seek to alter, modify, or change another licensee's fee or commission for real estate brokerage services without that licensee's prior written consent.

ITEM 3. Rescind 193E—Chapter 4 and adopt the following **new** chapter in lieu thereof:

**CHAPTER 4  
INVESTIGATIONS AND DISCIPLINARY  
PROCEDURES**

**193E—4.1(543B) Discipline and hearing procedure.** The Iowa real estate commission has authority derived from Iowa Code chapter 543B, entitled "Real Estate Brokers and Salespersons," and from Iowa Code chapter 272C, entitled "Continuing Professional and Occupational Education," to impose discipline for any violation of these two chapters, or the rules promulgated thereunder.

**193E—4.2(543B) Definitions.**

"Issuance" means the date of mailing of a decision or order or date of delivery if service is by other means unless another date is specified in the order.

"Proposed decision" means the presiding officer's recommended findings of fact, conclusions of law, decision, and order on a contested case in which the commission did not preside.

**193E—4.3(543B) Proceedings.** The proceeding for revocation or suspension of a license to engage in real estate practice or to discipline a person licensed to practice the real estate profession or the denial of a license shall be substantially in accord with the following procedures which are an elaboration of or in addition to the procedures stated in Iowa Code sections 543B.35 and 543B.36.

**193E—4.4(543B) Confidentiality of investigative files.** Complaint files, and investigation files, and all other investigation reports and other investigating information in the possession of the commission or its employees or agents which relates to licensee discipline shall be privileged and confidential, and shall not be subject to discovery, subpoena, or other means of legal compulsion for their release to any person other than the licensee and the commission, its employees and agents involved in licensee discipline, or be admissible in evidence in any judicial or administrative proceeding other than the proceeding involving licensee discipline. However, a final written decision and finding of fact of the commission in a disciplinary proceeding shall be public record, including orders, assurance of voluntary compliance and dismissed complaints.

Nothing in this rule shall prohibit access to information pursuant to Iowa Code chapter 2C.

**193E—4.5(543B) Form and content of the written complaint.** A complaint shall be made in writing and shall be signed by complainant or an authorized representative of the complainant. The complaint may be in the form of a letter or affidavit or it may be made using an official complaint form which may be obtained from the commission office upon request. A written complaint shall contain the following information:

1. The full name, address and telephone number of the complainant.
2. The full name, address and telephone number, if known, of the respondent.
3. A concise statement of the facts which clearly and accurately apprise the commission of the allegations against the respondent.

**193E—4.6(543B) Place and time of filing.** The complaint may be delivered personally or by mail to the executive secretary of the commission at the office of the commission. Timely filing is encouraged to ensure the availability of witnesses and to avoid initiation of an investigation under conditions which may have been substantially altered during the period of delay.

**193E—4.7(543B) Disciplinary committee.** The commission may appoint a disciplinary committee of two to five commission members for the purpose of reviewing complaints pertinent to the business of the real estate commission including reviewing complaints related to licensee discipline. At the request of the disciplinary committee, the commission may expand the size of the disciplinary committee at any time to facilitate the resolution of a particular case.

**193E—4.8(543B) Receipt of complaints and initiation of investigations.** When the commission receives a complaint pursuant to Iowa Code section 543B.34, or initiates a complaint on its own motion, the complaint shall be reviewed by the executive secretary.

**4.8(1)** If the complaint is a verified, written complaint, which together with evidence presented with the complaint makes out a prima facie case of a violation of a law within the investigative jurisdiction of the commission, the executive

## REAL ESTATE COMMISSION[193E](cont'd)

secretary shall refer the complaint to the disciplinary committee.

**4.8(2)** If the complaint does not meet the criteria set forth in the preceding sentence, the executive secretary may either refer the complaint to the disciplinary committee or, if in the opinion of the executive secretary the complaint is frivolous or clearly outside the jurisdiction of the commission, the executive secretary may decline to pursue the complaint further. If the executive secretary does not pursue the complaint, the complainant shall be informed by letter containing a statement specifying the reasons for rejection. If a complainant objects in writing to the executive secretary's decision not to further pursue a complaint, the executive secretary shall submit the complaint to the disciplinary committee for its consideration.

**4.8(3)** The executive secretary shall report to the disciplinary committee as necessary concerning actions taken on complaints received by the commission.

**193E—4.9(543B) Disciplinary committee procedures.**

**4.9(1)** Upon receipt of a complaint by the disciplinary committee, the committee shall determine whether a violation is alleged. If the committee determines that the facts alleged may warrant disciplinary action, the committee shall open a disciplinary case against the licensee. If the disciplinary committee determines that no disciplinary action is warranted, the committee shall take no further action on the complaint. If the complaint is not pursued by the committee, the complainant shall be informed by letter containing a statement specifying the reasons for rejection.

**4.9(2)** If a disciplinary case is opened, the disciplinary committee shall examine available information to determine whether there is probable cause to believe an alleged disciplinary violation has occurred which warrants discipline or whether additional information is required before such a determination can be made. If additional information is needed, the committee may assign an investigator to obtain additional information. Upon completion of the investigation, the results of the investigation shall be provided to the committee.

**4.9(3)** Following or during the review the disciplinary committee may take one or more of the following actions:

- a. Request further investigation.
- b. Request that the licensee who is the subject of the complaint meet with the disciplinary committee to informally discuss the allegations.
- c. Determine that there is no probable cause that a violation has occurred which warrants discipline and close the complaint. Prior to or at the time the complaint is closed, the disciplinary committee may choose to send a letter to the licensee regarding the conduct alleged in the complaint which may include the committee's recommendations to the licensee. If a letter is sent pursuant to this paragraph, the letter shall not be available for public inspection and shall not constitute disciplinary action by the commission.
- d. Determine that there is probable cause to believe that a violation has occurred which warrants discipline.
- e. Determine that there is probable cause to believe that a violation of Iowa Code section 543B.1 has occurred which shall be referred to a court of competent jurisdiction pursuant to Iowa Code section 543B.44.
- f. Attempt informal settlement of the complaint. If the disciplinary committee determines that probable cause exists indicating that a law or rule within the jurisdiction of the commission has been violated and that discipline is warranted, the committee shall consider settling the complaint informally. If the disciplinary committee determines that a

satisfactory settlement cannot be reached, the committee may commence a contested case proceeding against the licensee by causing a notice of hearing to be served.

**g.** Stay further action on the complaint. If the disciplinary committee finds that the complaint is against a licensee whose license has expired or has been revoked, the committee may stay further action on the complaint either prior to or after commencing a contested case proceeding against the licensee. If the proceedings are stayed, the committee shall notify the former licensee of the pending charges.

**4.9(4)** In determining the appropriate action to pursue, the disciplinary committee shall consider the severity of the violation alleged, the sufficiency of the evidence, the possibility that the problem can be better resolved by other means available to the parties, without commission involvement, the clarity of the laws and rules which support the alleged violation, the clarity of the commission's jurisdiction, whether the violation is likely to reoccur, the record of the licensee and any other factors which are relevant to the committee's decision in a particular case.

**193E—4.10(543B) Informal discussion procedures.** The disciplinary committee may request that a licensee and the licensee's employing broker attend an informal discussion. The licensee or the employing broker is not required to attend or participate in any informal discussion requested by the disciplinary committee. The licensee and employing broker are, however, required to inform the committee as to whether they will attend an informal discussion which is requested by the committee.

**4.10(1)** The informal discussion is a part of the committee's review of a pending disciplinary case, and facts discussed at the informal discussion may be considered by the commission in the event that the complaint advances to a contested case hearing and those facts are independently introduced into evidence in that proceeding.

**4.10(2)** If the licensee chooses, the licensee may be represented by an attorney at the informal discussion at the expense of the licensee.

**4.10(3)** The informal discussion shall be held in closed session.

**4.10(4)** The committee may seek an informal stipulation or settlement of the case at the time of the informal discussion. If the parties agree to an informal settlement of the case at the time of the informal discussion, a statement of charges shall be filed simultaneously with the settlement document. In the event the committee does not reach a settlement under this subrule, additional settlement rules in this chapter are still applicable.

**4.10(5)** By consenting to participate in an informal discussion, the licensee waives any right of notice and opportunity to participate in any communications between the disciplinary committee and the prosecuting attorney or commission staff who are involved in review of the case. This waiver shall be effective until such time as a notice of hearing is filed against the licensee.

**4.10(6)** Members of the disciplinary committee participating in informal discussions are not disqualified from participating in the adjudication of any contested case proceeding which may be necessary to resolve the complaint.

**4.10(7)** By electing to attend, the licensee waives the right to seek disqualification of a commission member or commission staff from participating in the making of a contested case decision or acting as a presiding officer in a later contested case proceeding.

**193E—4.11(543B) Settlements.**

## REAL ESTATE COMMISSION[193E](cont'd)

**4.11(1)** Settlement negotiations may be initiated after a statement of charges is filed. Neither the licensee nor the commission is obligated to utilize this procedure. Settlement negotiations may be initiated by the state of Iowa acting through the prosecuting attorney, by the respondent or by the commission. The chairperson of the commission, or another commission member designated by the chairperson, shall have authority to negotiate on behalf of the commission.

**4.11(2)** If a licensee consents to pursue settlement, the licensee waives any right of notice and opportunity to participate in any communications between the commission chair or the chair's designee and the prosecuting attorney or investigating staff members who are thereafter involved in the settlement negotiations or in presentation of the settlement to the commission.

**4.11(3)** The proposed settlement may be submitted to the full commission by the prosecuting attorney, commission staff, or the commission member involved in the negotiations.

**4.11(4)** The commission shall not consider any settlement negotiation pursuant to this rule until a proposed, written settlement, signed by the licensee, is submitted to the commission for approval.

**4.11(5)** All settlement agreements are subject to the approval of a majority of the full commission. If the commission fails to approve the settlement, the proposed settlement shall be of no force or effect to either party.

**4.11(6)** The settlement discussion by the full commission shall be held in closed session.

**4.11(7)** The commission member who participates in the negotiation of a settlement is not disqualified from participating in the commission's consideration of the proposed settlement or the adjudication of any contested case which may be necessary to resolve the complaint.

**4.11(8)** Following approval of a settlement by the full commission and filing of the settlement document, the settlement document shall be available for public inspection.

**193E—4.12(543B) Refusal to set hearing.** Reasons for refusal to set hearing by the commission may include but are not necessarily limited to the following:

1. Triviality of the allegation.
2. Insufficiency of evidence.
3. Effort to resolve problem on the local level.
4. Lack of clarity of the issue.
5. Lack of jurisdiction.

**193E—4.13(543B) Ruling on the initial inquiry.**

**4.13(1) Rejection.** If a determination is made by the commission to reject the case, the complainant shall be provided a statement specifying the reasons for rejection. A letter of explanation concerning the decision of the commission shall be sent to the respondent.

**4.13(2) Requirement of further inquiry.** If determination is made by the commission to order further inquiry, the complaint and recommendations shall be returned to the investigator(s) along with an oral or written statement specifying the information deemed necessary.

**4.13(3) Acceptance of the case.** If a determination is made by the commission that probable cause to hold hearing exists, the commission may initiate contested case proceedings. The commission may enter into informal settlement negotiations prior to holding a contested case hearing. As a result of informal settlement, the commission may impose any of the penalties available to it. If informal negotiation is not taken or successful, the commission may proceed with

formal disciplinary proceedings through contested case proceedings.

**193E—4.14(543B) Withdrawal or amendment.** A complaint may be amended or withdrawn at any time prior to official notification of the parties and thereafter at the sole discretion of the commission. The commission may choose to pursue a matter even after a complaint has been withdrawn.

**193E—4.15(543B) Order for hearing or complaint.** The commission may, upon its own motion or upon receipt of a complaint in writing, issue an order fixing the time and place for hearing. A written notice of hearing, together with a statement of the charges, shall be mailed to the licensee at least 20 days before the hearing by restricted certified mail return receipt requested to the last-known business address of the licensee or may be served as in the manner of an original notice. Delivery of personal notice to the licensee or refusal by the licensee to accept restricted certified mailing may constitute commencement of the contested case proceedings.

**193E—4.16(543B) Statement of charges.** The statement of charges shall set forth in ordinary and concise language the acts or omissions with which the respondent is charged and shall be in sufficient detail to enable the efficient preparation of the respondent's defense. The statement of charges shall specify the statute(s) and any rule(s) alleged to have been violated, and may also include any additional information which the commission deems appropriate to the proceedings.

**193E—4.17(543B) Notice of hearing.** The notice of hearing shall state:

1. The date, time and place of hearing.
2. A statement that the party may be represented by legal counsel at all stages.
3. A statement of the legal authority and jurisdiction under which the hearing is to be held.
4. Reference to the statutes and rules involved.
5. A short and plain statement of the matter asserted.
6. A statement that the respondent has the right to appear at a hearing and be heard.
7. A statement requiring the respondent to submit an answer, as outlined in rule 4.18(543B).
8. A statement requiring the respondent within the period of ten days after receipt of the notice of hearing to acknowledge receipt of the notice of hearing on the form provided with the notice.
9. A statement requiring the respondent to furnish the commission with a list of potential witnesses, with their current addresses, whom the respondent intends to have called. The answer required in numbered paragraph 7 and the list of potential witnesses, if any, as required in this paragraph shall be provided to the executive secretary no later than ten days prior to the date set for hearing.
10. Identification of the presiding officer, if known. If not known, a description of who will serve as presiding officer (i.e., the commission or administrative law judge from the department of inspections and appeals); and
11. Notification of the time period in which a party may request, pursuant to 1998 Iowa Acts, chapter 1202, section 15(1), and rule 4.19(17A) that the presiding officer be an administrative law judge.

**193E—4.18(543B) Form of answer.** The answer shall be captioned "Before the Iowa Real Estate Commission", and shall be titled: "ANSWER". The answer shall contain the following information:

1. The name, address and telephone number of the respondent.

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2. Specific statements regarding any or all allegations in the complaint which shall be in the form of admissions, denials, explanations, remarks or statements of mitigating circumstances.

3. Any additional facts or information the respondent deems relevant to the complaint and which may be of assistance in the ultimate determination of the case.

**193E—4.19(17A) Presiding officer.**

**4.19(1)** Any party who wishes to request that the presiding officer assigned to render a proposed decision be an administrative law judge employed by the department of inspections and appeals must file a written request within 20 days after service of a notice of hearing which identifies or describes the presiding officer as the commission or a panel of the commission.

**4.19(2)** The commission may deny the request only upon a finding that one or more of the following apply:

a. Neither the commission nor any officer of the commission under whose authority the contested case is to take place is a named party to the proceeding or a real party in interest to that proceeding.

b. There is a compelling need to expedite issuance of a final decision in order to protect the public health, safety, or welfare.

c. The case involves a disciplinary hearing to be held by the commission pursuant to Iowa Code section 272C.6.

d. The case involves significant policy issues of first impression that are inextricably intertwined with the factual issues presented.

e. The demeanor of the witnesses is likely to be dispositive in resolving the disputed factual issues.

f. Funds are unavailable to pay the costs of an administrative law judge and an intercommission appeal.

g. The request was not timely filed.

h. The request is not consistent with a specified statute.

**4.19(3)** The commission shall issue a written ruling specifying the grounds for its decision within 20 days after a request for an administrative law judge is filed.

**4.19(4)** Except as provided otherwise by another provision of law, all rulings by an administrative law judge acting as presiding officer are subject to appeal to the commission. A party must seek any available intra-agency appeal in order to exhaust adequate administrative remedies.

**193E—4.20(17A) Time requirements.**

**4.20(1)** Time shall be computed as provided in Iowa Code subsection 4.1(34).

**4.20(2)** For good cause, the presiding officer may extend or shorten the time to take any action, except as precluded by statute. Except for good cause stated in the record, before extending or shortening the time to take any action, the presiding officer shall afford all parties an opportunity to be heard or to file written arguments.

**193E—4.21(17A) Requests for contested case proceeding.** Any person claiming an entitlement to a contested case proceeding shall file a written request for such a proceeding within the time specified by the particular rules or statutes governing the subject matter or, in the absence of such law, the time specified in the commission action in question.

The request for a contested case proceeding should state the name and address of the requester, identify the specific commission action which is disputed and, where the requester is represented by a lawyer, identify the provisions of law or precedent requiring or authorizing the holding of a contested case proceeding in the particular circumstances in-

involved, and include a short and plain statement of the issues of material fact in dispute.

**193E—4.22(543B,272C) Legal representation.** Every statement of charges and notice of hearing prepared by the commission shall be reviewed and approved by the office of the attorney general which shall be responsible for the legal representation of the public interest in all proceedings before the commission. The assistant attorney general assigned to prosecute a contested case before the commission shall not represent the commission in that case but shall represent the public interest.

**193E—4.23(17A) Waiver of procedures.** Unless otherwise precluded by law, the parties in a contested case proceeding may waive any provision of this chapter. However, the commission in its discretion may refuse to give effect to such a waiver when it deems the waiver to be inconsistent with the public interest.

**193E—4.24(17A) Telephone proceedings.** The presiding officer may resolve preliminary procedural motions by telephone conference in which all parties have an opportunity to participate. Other telephone proceedings may be held with the consent of all parties. The presiding officer will determine the location of the parties and witnesses for telephone hearings. The convenience of the witnesses or parties, as well as the nature of the case, will be considered when location is chosen.

**193E—4.25(17A) Disqualification.**

**4.25(1)** A presiding officer or other person shall withdraw from participation in the making of any proposed or final decision in a contested case if that person:

a. Has a personal bias or prejudice concerning a party or a representative of a party;

b. Has personally investigated, prosecuted or advocated, in connection with that case, the specific controversy underlying that case, another pending factually related contested case, or a pending factually related controversy that may culminate in a contested case involving the same parties;

c. Is subject to the authority, direction or discretion of any person who has personally investigated, prosecuted or advocated in connection with that contested case, the specific controversy underlying that contested case, or a pending factually related contested case or controversy involving the same parties;

d. Has acted as counsel to any person who is a private party to that proceeding within the past two years;

e. Has a personal financial interest in the outcome of the case or any other significant personal interest that could be substantially affected by the outcome of the case;

f. Has a spouse or relative within the third degree of relationship that (1) is a party to the case, or an officer, director or trustee of a party; (2) is a lawyer in the case; (3) is known to have an interest that could be substantially affected by the outcome of the case; or (4) is likely to be a material witness in the case; or

g. Has any other legally sufficient cause to withdraw from participation in the decision making in that case.

**4.25(2)** The term "personally investigated" means taking affirmative steps to interview witnesses directly or to obtain documents or other information directly. The term "personally investigated" does not include general direction and supervision of assigned investigators, unsolicited receipt of information which is relayed to assigned investigators, review of another person's investigative work product in the course of determining whether there is probable cause to initiate a

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proceeding, or exposure to factual information while performing other commission functions, including fact gathering for purposes other than investigation of the matter which culminates in a contested case. Factual information relevant to the merits of a contested case received by a person who later serves as presiding officer in that case shall be disclosed if required by Iowa Code section 17A.17 as amended by 1998 Iowa Acts, chapter 1202, section 19, and subrules 4.25(3) and 4.41(9).

**4.25(3)** In a situation where a presiding officer or other person knows of information which might reasonably be deemed to be a basis for disqualification and decides voluntarily withdrawal is unnecessary, that person shall submit the relevant information for the record by affidavit and shall provide for the record a statement of the reasons for the determination that withdrawal is unnecessary.

**4.25(4)** If a party asserts disqualification on any appropriate ground, including those listed in subrule 4.25(1), the party shall file a motion supported by an affidavit pursuant to Iowa Code section 17A.17 as amended by 1998 Iowa Acts, chapter 1202, section 19(7). The motion must be filed as soon as practicable after the reason alleged in the motion becomes known to the party.

If, during the course of the hearing, a party first becomes aware of evidence of bias or other grounds for disqualification, the party may move for disqualification but must establish the grounds by the introduction of evidence into the record.

If the presiding officer determines that disqualification is appropriate, the presiding officer or other person shall withdraw. If the presiding officer determines that withdrawal is not required, the presiding officer shall enter an order to that effect. A party asserting disqualification may seek an interlocutory appeal under rule 4.47(17A) and seek a stay under rule 4.49(17A).

**193E—4.26(17A) Consolidation—severance.**

**4.26(1)** Consolidation. The presiding officer may consolidate any or all matters at issue in two or more contested case proceedings where (a) the matters at issue involve common parties or common questions of fact or law; (b) consolidation would expedite and simplify consideration of the issues involved; and (c) consolidation would not adversely affect the rights of any of the parties to those proceedings.

**4.26(2)** Severance. The presiding officer may, for good cause shown, order any contested case proceedings or portions thereof severed.

**193E—4.27(17A) Amendments.** Any notice of hearing or statement of charges may be amended before a responsive pleading has been filed. Amendments to pleadings after a responsive pleading has been filed and to an answer may be allowed with the consent of the other parties or in the discretion of the presiding officer who may impose terms or grant a continuance.

**193E—4.28(17A) Service and filing of pleadings and other papers.**

**4.28(1)** When service required. Except where otherwise provided by law, every pleading, motion, document, or other paper filed in a contested case proceeding and every paper relating to discovery in such a proceeding shall be served upon each of the parties of record to the proceeding, including the person designated as advocate or prosecutor for the state or the commission, simultaneously with their filing. Except for the original notice of hearing and an application for rehearing as provided in Iowa Code section 17A.16(2),

the party filing a document is responsible for service on all parties.

**4.28(2)** Service—how made. Service upon a party represented by an attorney shall be made upon the attorney unless otherwise ordered. Service is made by delivery or by mailing a copy to the person's last-known address. Service by mail is complete upon mailing, except where otherwise specifically provided by statute, rule, or order.

**4.28(3)** Filing—when required. After the notice of hearing, all pleadings, motions, documents or other papers in a contested case proceeding shall be filed with the commission. All pleadings, motions, documents or other papers that are required to be served upon a party shall be filed simultaneously with the commission.

**4.28(4)** Filing—when made. Except where otherwise provided by law, a document is deemed filed at the time it is delivered to the commission, delivered to an established courier service for immediate delivery to that office, or mailed by first-class mail or state interoffice mail to that office, so long as there is proof of mailing.

**4.28(5)** Proof of mailing. Proof of mailing includes either a legible United States Postal Service postmark on the envelope, a certificate of service, a notarized affidavit, or a certification in substantially the following form:

I certify under penalty of perjury and pursuant to the laws of Iowa that, on (date of mailing), I mailed copies of (describe document) addressed to the Real Estate Commission and to the names and addresses of the parties listed below by depositing the same in (a United States post office mailbox with correct postage properly affixed or state interoffice mail).

(Date) \_\_\_\_\_ (Signature) \_\_\_\_\_

**193E—4.29(17A) Discovery.**

**4.29(1)** Discovery procedures applicable in civil actions are applicable in contested cases. Unless lengthened or shortened by these rules or by order of the presiding officer, time periods for compliance with discovery shall be as provided in the Iowa Rules of Civil Procedure.

**4.29(2)** Any motion relating to discovery shall allege that the moving party has previously made a good-faith attempt to resolve the discovery issues involved with the opposing party. Motions in regard to discovery shall be ruled upon by the presiding officer. Opposing parties shall be afforded the opportunity to respond within ten days of the filing of the motion unless the time is shortened as provided in subrule 4.29(1). The presiding officer may rule on the basis of the written motion and any response, or may order argument on the motion.

**4.29(3)** Evidence obtained in discovery may be used in the contested case proceeding if that evidence would otherwise be admissible in that proceeding.

**193E—4.30(17A) Subpoenas.** In connection with the investigation of a complaint, the commission is authorized by law to subpoena books, papers, records, and any other real evidence, whether or not privileged or confidential under law, to help it determine whether it should institute a contested case proceeding (disciplinary hearing). After service of the notice of hearing under rule 4.17(543B,272C), the following procedures are available to the parties in order to obtain relevant and material evidence:

**4.30(1)** Commission subpoenas for books, papers, records, and other real evidence will be issued to a party upon request. Subpoenas for witnesses may also be obtained. The executive secretary shall issue all subpoenas for both parties upon request. The request, which may be verbal or written,

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must specify the documents sought to be obtained and the names of the witnesses whose testimony is desired.

**4.30(2)** The presiding officer may quash or modify a subpoena for any lawful reason upon motion in accordance with the Iowa Rules of Civil Procedure. A motion to quash or modify a subpoena shall be set for argument promptly.

**4.30(3)** In the event of a refusal to obey a subpoena, either party or the commission may petition the district court for its enforcement. Upon proper showing, the district court shall order the person to obey the subpoena and, if the person fails to obey the order of the court, the person may be found guilty of contempt of court.

**193E—4.31(17A) Motions.**

**4.31(1)** No technical form for motions is required. However, prehearing motions must be in writing, state the grounds for relief, and state the relief sought.

**4.31(2)** Any party may file a written response to a motion within ten days after the motion is served, unless the time period is extended or shortened by rules of the commission or the presiding officer. The presiding officer may consider a failure to respond within the required time period in ruling on a motion.

**4.31(3)** The presiding officer may schedule oral argument on any motion.

**4.31(4)** Motions pertaining to the hearing, except motions for summary judgment, must be filed and served at least five days prior to the date of hearing unless there is good cause for permitting later action or the time for such action is lengthened or shortened by rule of the commission or an order of the presiding officer.

**4.31(5)** Motions for summary judgment shall comply with the requirements of Iowa Rule of Civil Procedure 237 and shall be subject to disposition according to the requirements of that rule to the extent such requirements are not inconsistent with the provisions of this rule or any other provision of law governing the procedure in contested cases.

Motions for summary judgment must be filed and served at least 20 days prior to the scheduled hearing date, or other time period determined by the presiding officer. Any party resisting the motion shall file and serve a resistance within 10 days, unless otherwise ordered by the presiding officer, from the date a copy of the motion was served. The time fixed for hearing or nonoral submission shall be not less than 15 days after the filing of the motion, unless a shorter time is ordered by the presiding officer. A summary judgment order rendered on all issues in a contested case is subject to rehearing pursuant to rule 4.48(17A) and appeal pursuant to rule 4.52(17A).

**193E—4.32(17A) Prehearing conference.**

**4.32(1)** Any party may request a prehearing conference. A written request for prehearing conference or an order for prehearing conference on the presiding officer's own motion shall be filed not less than seven days prior to the hearing date. A prehearing conference shall be scheduled not less than three business days prior to the hearing date.

Written notice of the prehearing conference shall be given by the commission to all parties. For good cause the presiding officer may permit variances from this rule.

**4.32(2)** Each party shall bring to the prehearing conference:

a. A final list of the witnesses who the party anticipates will testify at hearing. Witnesses not listed may be excluded from testifying unless there was good cause for the failure to include their names; and

b. A final list of exhibits which the party anticipates will be introduced at hearing. Exhibits other than rebuttal exhibits that are not listed may be excluded from admission into evidence unless there was good cause for the failure to include them.

c. Witness or exhibit lists may be amended subsequent to the prehearing conference within the time limits established by the presiding officer at the prehearing conference. Any such amendments must be served on all parties.

**4.32(3)** In addition to the requirements of subrule 4.32(2), the parties at a prehearing conference may:

- a. Enter into stipulations of law or fact;
- b. Enter into stipulations on the admissibility of exhibits;
- c. Identify matters which the parties intend to request be officially noticed;
- d. Enter into stipulations for waiver of any provision of law; and
- e. Consider any additional matters which will expedite the hearing.

**4.32(4)** Prehearing conferences shall be conducted by telephone unless otherwise ordered. Parties shall exchange and receive witness and exhibit lists in advance of a telephone prehearing conference.

**193E—4.33(17A) Continuances.** Unless otherwise provided, applications for continuances shall be made to the presiding officer.

**4.33(1)** A written application for a continuance shall:

- a. Be made at the earliest possible time and no less than seven days before the hearing except in case of unanticipated emergencies;
- b. State the specific reasons for the request; and
- c. Be signed by the requesting party or the party's representative.

An oral application for a continuance may be made if the presiding officer waives the requirement for a written motion. However, a party making such an oral application for a continuance must confirm that request by written application within five days after the oral request unless that requirement is waived by the presiding officer. No application for continuance shall be made or granted without notice to all parties except in an emergency where notice is not feasible. The board may waive notice of such requests for a particular case or an entire class of cases.

**4.33(2)** In determining whether to grant a continuance, the presiding officer may consider:

- a. Prior continuances;
- b. The interests of all parties;
- c. The likelihood of informal settlement;
- d. The existence of an emergency;
- e. Any objection;
- f. Any applicable time requirements;
- g. The existence of a conflict in the schedules of counsel, parties, or witnesses;
- h. The timeliness of the request; and
- i. Other relevant factors.

The presiding officer may require documentation of any grounds for continuance.

**193E—4.34(17A) Withdrawals.** A party requesting a contested case proceeding may withdraw that request prior to the hearing only in accordance with commission rules. Unless otherwise provided, a withdrawal shall be with prejudice.

**193E—4.35(17A) Intervention.**

**4.35(1)** Motion. A motion for leave to intervene in a contested case proceeding shall state the grounds for the pro-

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posed intervention, the position and interest of the proposed intervenor, and the possible impact of intervention on the proceeding. A proposed answer or petition in intervention shall be attached to the motion. Any party may file a response within 14 days of service of the motion to intervene unless the time period is extended or shortened by the presiding officer.

**4.35(2)** When filed. Motion for leave to intervene shall be filed as early in the proceeding as possible to avoid adverse impact on existing parties or the conduct of the proceeding. Unless otherwise ordered, a motion for leave to intervene shall be filed before the prehearing conference, if any, or at least 20 days before the date scheduled for hearing. Any later motion must contain a statement of good cause for the failure to file in a timely manner. Unless inequitable or unjust, an intervenor shall be bound by any agreement, arrangement, or other matter previously raised in the case. Requests by untimely intervenors for continuances which would delay the proceeding will ordinarily be denied.

**4.35(3)** Grounds for intervention. The movant shall demonstrate that (a) intervention would not unduly prolong the proceedings or otherwise prejudice the rights of existing parties; (b) the movant is likely to be aggrieved or adversely affected by a final order in the proceeding; and (c) the interests of the movant are not adequately represented by existing parties.

**4.35(4)** Effect of intervention. If appropriate, the presiding officer may order consolidation of the petitions and briefs of different parties whose interests are aligned with each other and limit the number of representatives allowed to participate actively in the proceedings. A person granted leave to intervene is a party to the proceeding. The order granting intervention may restrict the issues that may be raised by the intervenor or otherwise condition the intervenor's participation in the proceeding.

**193E—4.36(543B) Record of proceedings.** Oral proceedings shall be recorded either by mechanical or electrical means, or by certified shorthand reporters. Oral proceedings or any part thereof shall be transcribed at the request of any party at the expense of the requesting party. The recording or stenographic notes of oral proceedings or the transcription thereof shall be filed and maintained in accordance with the provisions of Iowa Code section 17A.12(7). Any party to a proceeding may record, at the party's own expense, stenographically or electronically, any portion or all of the proceedings.

**193E—4.37(543B) Hearings.** A hearing may be conducted before the full commission, or one or more members of the commission, or before an administrative law judge in accordance with Iowa Code section 17A.11.

**4.37(1)** When a hearing is held before the commission, or a small number of commissioners, the commission chairperson or someone designated by the chairperson shall act as the presiding officer. The presiding officer or administrative law judge shall be in control of the proceedings and shall have the authority to administer oaths, to admit or exclude testimony or other evidence and to rule on all motions and objections.

**4.37(2)** The presiding officer and commission members have the right to conduct a direct examination of the testimony of a witness at the time the testimony is given or at a later stage during the proceeding. Direct examination and cross-examination by commission members are subject to objections properly raised in accordance with the rules of evidence noted in subrules 4.39(1) and 4.39(2).

**193E—4.38(543B) Order of proceedings.** Before testimony is presented, the record shall show the identity of any commission members present, the identity of the hearing panel or administrative law judge, the identity of the primary parties and their representatives, and of the fact that all testimony is being recorded. Hearings before the commission or a panel of the commission or before an administrative law judge shall generally be conducted in the following order, subject to modification at the discretion of the commission or of the panel of the commission conducting the proceedings.

1. The presiding officer or designee may read a summary of the charges and answers thereto, and other responsive pleadings filed by the respondent prior to the hearing.

2. The assistant attorney general or other person representing the state or commission interest before the commission shall make a brief opening statement which shall include a summary of the charges and the witnesses and documents to support such charges.

3. The respondent or respondents shall each be offered the opportunity to make an opening statement, including the names of any witnesses the respondent(s) desires to call in defense. A respondent may elect to make the opening statement just prior to the presentation of evidence by the respondent.

4. The presentation of evidence on behalf of the public.

5. A summary, at the close of the evidence on behalf of the state or commission, of the case and what was sought to be proven.

6. The presentation of evidence on behalf of the respondent(s).

7. Rebuttal evidence on behalf of the state or commission, if any.

8. Rebuttal evidence on behalf of the respondent(s), if any.

9. Closing arguments first on behalf of the state or commission, then on behalf of the respondent, and then on behalf of the state or commission, if any.

**193E—4.39(543B) Rules of evidence—documentary evidence—official notice.**

**4.39(1)** The presiding officer shall rule on admissibility of evidence and may, where appropriate, take official notice of facts in accordance with all applicable requirements of law.

**4.39(2)** Stipulation of facts is encouraged. The presiding officer may make a decision based on stipulated facts.

**4.39(3)** Evidence in the proceeding shall be confined to the issues as to which the parties received notice prior to the hearing unless the parties waive their right to such notice or the presiding officer determines that good cause justifies expansion of the issues. If the presiding officer decides to admit evidence on issues outside the scope of the notice over the objection of a party who did not have actual notice of those issues, that party, upon timely request, shall receive a continuance sufficient to amend pleadings and to prepare on the additional issue.

**4.39(4)** The party seeking admission of an exhibit must provide opposing parties with an opportunity to examine the exhibit prior to the ruling on its admissibility. Copies of documents shall be provided to opposing parties. Copies may also be furnished to members of the board.

All exhibits admitted into evidence shall be appropriately marked and be made part of the record.

**4.39(5)** Any party may object to specific evidence or may request limits on the scope of any examination or cross-examination. Such an objection shall be accompanied by a brief statement of the grounds upon which it is based. The

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objection, the ruling on the objection, and the reasons for the ruling shall be noted in the record. The presiding officer may rule on the objection at the time it is made or may reserve a ruling until the written decision.

**4.39(6)** Whenever evidence is ruled inadmissible, the party offering that evidence may submit an offer of proof on the record. The party making the offer of proof for excluded oral testimony shall briefly summarize the testimony or, with permission of the presiding officer, present the testimony. If the excluded evidence consists of a document or exhibit, it shall be marked as part of an offer of proof and inserted in the record.

**4.39(7)** Irrelevant, immaterial and unduly repetitious evidence should be excluded. A finding will be based upon the kind of evidence upon which reasonably prudent persons are accustomed to rely for the conduct of their serious affairs, and may be based upon such evidence even if it would be inadmissible in a jury trial.

**4.39(8)** Objections to evidentiary offers may be made and shall be noted in the record. Motions and offers to amend the pleadings may also be made at the hearing and shall be noted in the record together with the rulings thereon.

**4.39(9)** Subject to the above requirements, when a hearing will be expedited and the interests of the parties will not be prejudiced substantially, any part of the evidence may be submitted in writing in certified form, e.g., affidavit, sworn statements or certified documents.

**4.39(10)** Documentary evidence may be received in the form of copies if the original is not readily available. Documentary evidence may be received in the form of excerpts if the entire document is not relevant. Accurate copies of any document should be made in advance of the hearing, as far as possible, in sufficient numbers for all members of the commission and shall be furnished to those members of the commission sitting at the hearing and to opposing parties. Upon request, parties shall be given the opportunity to compare the copy with the original, if available.

**4.39(11)** Witnesses at the hearing, or persons whose testimony has been submitted in written form, if available, shall be subject to cross-examination by any party as necessary for a full and true disclosure of the facts.

**4.39(12)** Official notice may be taken of all facts of which judicial notice may be taken and of other facts within the specialized knowledge of the commission. Parties shall be notified at the earliest practicable time, either before or during the hearing, or by reference in preliminary reports, preliminary decisions or otherwise, of the facts proposed to be noticed and their source, including any staff memoranda or data, and the parties shall be afforded an opportunity to contest such facts before the decision is announced unless the commission determines as part of the record or decision that fairness to the parties does not require an opportunity to contest such facts.

**193E—4.40(17A) Default.**

**4.40(1)** If a party fails to appear or participate in a contested case proceeding after proper service of notice, the presiding officer may, if no adjournment is granted, enter a default decision or proceed with the hearing and render a decision in the absence of the party.

**4.40(2)** Where appropriate and not contrary to law, any party may move for default against a party who has requested the contested case proceeding and has failed to file a required pleading or has failed to appear after proper service.

**4.40(3)** Default decisions or decisions rendered on the merits after a party has failed to appear or participate in a contested case proceeding become final commission action

unless, within 15 days after the date of notification or mailing of the decision, a motion to vacate is filed and served on all parties or an appeal of a decision on the merits is timely initiated within the time provided by rule 4.46(17A). A motion to vacate must state all facts relied upon by the moving party which establish that good cause existed for that party's failure to appear or participate at the contested case proceeding. Each fact so stated must be substantiated by at least one sworn affidavit of a person with personal knowledge of each such fact, which affidavit(s) must be attached to the motion.

**4.40(4)** The time for further appeal of a decision for which a timely motion to vacate has been filed is stayed pending a decision on the motion to vacate.

**4.40(5)** Properly substantiated and timely filed motions to vacate shall be granted only for good cause shown. The burden of proof as to good cause is on the moving party. Adverse parties shall have ten days to respond to a motion to vacate. Adverse parties shall be allowed to conduct discovery as to the issue of good cause and to present evidence on the issue prior to a decision on the motion, if a request to do so is included in that party's response.

**4.40(6)** "Good cause" for purposes of this rule shall have the same meaning as "good cause" for setting aside a default judgment under Iowa Rule of Civil Procedure 236.

**4.40(7)** A decision denying a motion to vacate is subject to further appeal within the time limit allowed for further appeal of a decision on the merits in the contested case proceeding. A decision granting a motion to vacate is subject to interlocutory appeal by the adverse party pursuant to rule 4.47(17A).

**4.40(8)** If a motion to vacate is granted and no timely interlocutory appeal has been taken, the presiding officer shall issue another notice of hearing and the contested case shall proceed accordingly.

**4.40(9)** A default decision may award any relief consistent with the request for relief made in the petition and embraced in its issues.

**4.40(10)** A default decision may provide either that the default decision is to be stayed pending a timely motion to vacate or that the default decision is to take effect immediately, subject to a request for stay under rule 4.49(17A).

**193E—4.41(17A) Ex parte communication.**

**4.41(1)** Prohibited communications. Unless required for the disposition of ex parte matters specifically authorized by statute, following issuance of the notice of hearing, there shall be no communication, directly or indirectly, between the presiding officer and any party or representative of any party or any other person with a direct or indirect interest in such case in connection with any issue of fact or law in the case except upon notice and opportunity for all parties to participate. This does not prohibit persons jointly assigned such tasks from communicating with each other. Nothing in this provision is intended to preclude the presiding officer from communicating with members of the board or seeking the advice or help of persons other than those with a personal interest in, or those engaged in personally investigating as defined in subrule 4.25(2), prosecuting, or advocating in, either the case under consideration or a pending factually related case involving the same parties as long as those persons do not directly or indirectly communicate to the presiding officer any ex parte communications they have received of a type that the presiding officer would be prohibited from receiving or that furnish, augment, diminish, or modify the evidence in the record.

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**4.41(2)** Prohibitions on ex parte communications commence with the issuance of the notice of hearing in a contested case and continue for as long as the case is pending.

**4.41(3)** Written, oral or other forms of communication are ex parte if made without notice and opportunity for all parties to participate.

**4.41(4)** To avoid prohibited ex parte communications notice must be given in a manner reasonably calculated to give all parties a fair opportunity to participate. Notice of written communications shall be provided in compliance with rule 4.28(17A) and may be supplemented by telephone, facsimile, electronic mail or other means of notification. Where permitted, oral communications may be initiated through conference telephone call including all parties or their representatives.

**4.41(5)** Persons who jointly act as presiding officers in a pending contested case may communicate with each other without notice or opportunity for parties to participate.

**4.41(6)** The executive secretary or other persons may be present in deliberations or otherwise advise the presiding officer without notice or opportunity for parties to participate as long as they are not disqualified from participating in the making of a proposed or final decision under any provision of law and they comply with subrule 4.41(1).

**4.41(7)** Communications with the presiding officer involving uncontested scheduling or procedural matters do not require notice or opportunity for parties to participate. Parties should notify other parties prior to initiating such contact with the presiding officer when feasible, and shall notify other parties when seeking to continue hearings or other deadlines pursuant to rule 4.33(17A).

**4.41(8)** Disclosure of prohibited communications. A presiding officer who receives a prohibited ex parte communication during the pendency of a contested case must initially determine if the effect of the communication is so prejudicial that the presiding officer should be disqualified. If the presiding officer determines that disqualification is warranted, a copy of any prohibited written communication, all written responses to the communication, a written summary stating the substance of any prohibited oral or other communication not available in written form for disclosure, all responses made, and the identity of each person from whom the presiding officer received a prohibited ex parte communication shall be submitted for inclusion in the record under seal by protective order. If the presiding officer determines that disqualification is not warranted, such documents shall be submitted for inclusion in the record and served on all parties. Any party desiring to rebut the prohibited communication must be allowed the opportunity to do so upon written request filed within ten days after notice of the communication.

**4.41(9)** Promptly after being assigned to serve as presiding officer at any stage in a contested case proceeding, a presiding officer shall disclose to all parties material factual information received through ex parte communication prior to such assignment unless the factual information has already been or shortly will be disclosed pursuant to Iowa Code section 17A.13(2) or through discovery. Factual information contained in an investigative report or similar document need not be separately disclosed by the presiding officer as long as such documents have been or will shortly be provided to the parties.

**4.41(10)** The presiding officer may render a proposed or final decision imposing appropriate sanctions for violations of this rule including default, a decision against the offending party, censure, or suspension or revocation of the privi-

lege to practice before the board. Violation of ex parte communication prohibitions by board personnel shall be reported to the division administrator for possible sanctions including censure, suspension, dismissal, or other disciplinary action.

**193E—4.42(17A) Recording costs.** Upon request, the board shall provide a copy of the whole or any portion of the record at cost. The cost of preparing a copy of the record or of transcribing the hearing record shall be paid by the requesting party.

Parties who request that a hearing be recorded by certified shorthand reporters rather than by electronic means shall bear the cost of that recordation, unless otherwise provided by law.

**193E—4.43(543B) Final decision.**

**4.43(1)** When three or more members of the commission preside over the reception of the evidence at the hearing, the commission's decision is a final decision. A finding of guilt or penalty by the commission shall require a majority vote of the entire commission.

**4.43(2)** If the hearing is conducted by fewer than three members of the commission or by an administrative law judge, the decision is a proposed decision and subject to the review provisions of rule 4.46(543B).

a. A proposed or final decision shall be in writing and shall consist of the following parts:

(1) A concise statement of the facts which support the findings of fact.

(2) Findings of fact. A party may submit proposed findings of fact and, where this is done, the decision shall include a ruling on each proposed finding.

b. Conclusions of law which shall be supported by cited authority or reasoned opinion.

c. The decision or order which sets forth the action to be taken or the disposition of the case.

d. The decision may include any of the following conclusions:

- (1) That the respondent be exonerated.
- (2) Revocation of license.
- (3) Suspension of license until further order of the commission or for a specified period.
- (4) Nonrenewal of license.
- (5) Prohibit permanently, until further order of the commission or for a specific period, the engaging in specified procedures, methods or acts.
- (6) Probation.
- (7) Require additional education or training.
- (8) Require reexamination.
- (9) Order a physical or mental examination with periodic reports to the commission, if deemed necessary.
- (10) Issue citation and warning.
- (11) Impose civil penalties not to exceed \$1,000.
- (12) Such other sanctions allowed by law as may be appropriate.

**193E—4.44(543B) Discretion of commission.** The following factors are among those which may be considered by the commission in determining the nature and severity of the disciplinary sanction to be imposed against a particular licensee or groups of licensees.

1. The relative seriousness of the violation as it relates to assuring the citizens of this state professional competency.
2. The facts of the particular violation.
3. Number of prior violations.
4. Seriousness of prior violations.
5. Whether remedial action has been taken.

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6. Such other factors as may reflect upon the competency, ethical standards and professional conduct of the licensee.

7. The impact of a particular activity upon the public.

**193E—4.45(543B) Final decision—filed with executive secretary.** The final decision of the commission, presiding officer or administrative law judge shall be filed with the executive secretary. A copy of the decision and order shall immediately be sent by certified mail return receipt requested to the licensee's last-known post office address or may be served as in the manner of original notices upon the licensee.

**193E—4.46(543B) Proposed decision—appeal to commission—procedures and requirements.** A proposed decision as defined in rule 4.2(543B) becomes a final decision unless appealed in accordance with the following procedure:

1. A proposed decision may be appealed to the commission by a party to the decision who is adversely affected thereby. An appeal is begun by serving on the executive secretary, either in person or by certified mail, a notice of appeal within 20 days after the service of the proposed decision or order on the appealing party. The appealing party shall be designated "appellant" and all other parties in the contested case proceedings shall be designated "appellee(s)".

2. Within 20 days after serving a notice of appeal, the appellant shall serve five copies of the exceptions, if any, together with the brief and argument desired by appellant. The appellant shall also furnish copies to each appellee by first-class mail. Any appellee to the appeal shall have 14 days after service of exceptions and brief on the executive secretary to file a responsive brief and argument. Except for the notice of appeal, the above time requirements will be extended by stipulation of the parties and may be extended upon application approved by a member of the commission or executive secretary.

3. Oral argument of the appeal is discretionary but may be required by the commission upon its own motion. At the times designated for filing briefs and arguments, either party may request oral argument. If a request for oral argument is granted or required, the executive secretary shall notify all parties of the date, time and place. The commission chairperson or a designated commissioner shall preside at the oral argument and determine the procedural order of the proceedings.

4. The record on appeal shall be the entire record made before the hearing panel or administrative law judge. The commission is not bound by any proposed findings of fact, conclusions of law or order but is free to accept, affirm, modify or reject such proposed findings, conclusions or order. The commission may consider other evidence or information, with notice to all parties, which was not originally presented at the hearing. The commission may give such new evidence or information whatever value or weight the commission desires.

**193E—4.47(17A) Interlocutory appeals.** Upon written request of a party or on its own motion, the commission may review an interlocutory order of the presiding officer. In determining whether to do so, the commission shall weigh the extent to which its granting the interlocutory appeal would expedite final resolution of the case and the extent to which review of that interlocutory order by the commission at the time it reviews the proposed decision of the presiding officer would provide an adequate remedy. Any request for interlocutory review must be filed within 14 days of issuance of the challenged order, but no later than the date for compliance with the order or the date of hearing, whichever is earlier.

**193E—4.48(17A) Applications for rehearing.**

**4.48(1)** By whom filed. Any party to a contested case proceeding may file an application for rehearing from a final order.

**4.48(2)** Content of application. The application for rehearing shall state on whose behalf it is filed, the specific grounds for rehearing, and the relief sought. In addition, the application shall state whether the applicant desires reconsideration of all or part of the commission decision on the existing record and whether the applicant requests an opportunity to submit additional evidence. A request to submit additional evidence must describe how the new evidence would be material and disclose a good-faith reason for the failure to timely present the evidence.

**4.48(3)** Time of filing. The application shall be filed with the commission within 20 days after issuance of the final decision.

**4.48(4)** Notice to other parties. A copy of the application shall be timely mailed by the applicant to all parties of record not joining therein. If the application does not contain a certificate of service, the commission shall serve copies on all parties.

**4.48(5)** Disposition. Any application for a rehearing shall be deemed denied unless the commission grants the application within 20 days after its filing.

**193E—4.49(17A) Stays of commission actions.**

**4.49(1)** When available.

a. Any party to a contested case proceeding may petition the commission for a stay of an order issued in that proceeding or for other temporary remedies, pending review by the commission. The petition shall be filed with the notice of appeal and shall state the reasons justifying a stay or other temporary remedy. The commission may rule on the stay or authorize the presiding officer to do so.

b. Any party to a contested case proceeding may petition the commission for a stay or other temporary remedies pending judicial review of all or part of that proceeding. The petition shall state the reasons justifying a stay or other temporary remedy.

**4.49(2)** When granted. In determining whether to grant a stay, the presiding officer or commission shall consider the factors listed in 1998 Iowa Acts, chapter 1202, section 23(5c).

**4.49(3)** Vacation. A stay may be vacated by the issuing authority upon application of the commission or any other party.

**193E—4.50(17A) No factual dispute contested cases.** If the parties agree that no dispute of material fact exists as to a matter that would be a contested case if such a dispute of fact existed, the parties may present all relevant admissible evidence either by stipulation or otherwise as agreed by the parties, without necessity for the production of evidence at an evidentiary hearing. If such agreement is reached, a jointly submitted schedule detailing the method and timetable for submission of the record, briefs and oral argument should be submitted to the presiding officer for approval as soon as practicable. If the parties cannot agree, any party may file and serve a motion for summary judgment pursuant to the rules governing such motions.

**193E—4.51(17A) Emergency adjudicative proceedings.**

**4.51(1)** Necessary emergency action. To the extent necessary to prevent or avoid immediate danger to the public health, safety or welfare, and consistent with the United States Constitution and the Iowa Constitution and other provisions of law, the commission may issue a written order in

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compliance with 1998 Iowa Acts, chapter 1202, section 21, to suspend a license in whole or in part, order the cessation of any continuing activity, order affirmative action, or take other action within the jurisdiction of the commission by emergency adjudicative order. Before issuing an emergency adjudicative order the commission shall consider factors including, but not limited to, the following:

a. Whether there has been a sufficient factual investigation to ensure that the commission is proceeding on the basis of reliable information;

b. Whether the specific circumstances which pose immediate danger to the public health, safety or welfare have been identified and determined to be continuing;

c. Whether the person required to comply with the emergency adjudicative order may continue to engage in other activities without posing immediate danger to the public health, safety or welfare;

d. Whether imposition of monitoring requirements or other interim safeguards would be sufficient to protect the public health, safety or welfare; and

e. Whether the specific action contemplated by the commission is necessary to avoid the immediate danger.

**4.51(2) Issuance of order.**

a. An emergency adjudicative order shall contain findings of fact, conclusions of law, and policy reasons to justify the determination of an immediate danger in the commission's decision to take immediate action.

b. The written emergency adjudicative order shall be immediately delivered to persons who are required to comply with the order by utilizing one or more of the following procedures:

(1) Personal delivery;

(2) Certified mail, return receipt requested, to the last address on file with the commission;

(3) Certified mail to the last address on file with the commission;

(4) First-class mail to the last address on file with the commission; or

(5) Fax. Fax may be used as the sole method of delivery if the person required to comply with the order has filed a written request that commission orders be sent by fax and has provided a fax number for that purpose.

c. To the degree practicable, the commission shall select the procedure for providing written notice that best ensures prompt, reliable delivery.

**4.51(3) Oral notice.** Unless the written emergency adjudicative order is provided by personal delivery on the same day that the order issues, the commission shall make reasonable immediate efforts to contact by telephone the persons who are required to comply with the order.

**4.51(4) Completion of proceedings.** After the issuance of an emergency adjudicative order, the commission shall proceed as quickly as feasible to complete any proceedings that would be required if the matter did not involve an immediate danger.

Issuance of a written emergency adjudicative order shall include notification of the date on which commission proceedings are scheduled for completion. After issuance of an emergency adjudicative order, continuance of further commission proceedings to a later date will be granted only in compelling circumstances upon application in writing.

**193E—4.52(543B) Judicial review and appeal.** Judicial review of the commission's action may be sought in accordance with the Iowa administrative procedure Act, from and after the date of the commission's order.

**193E—4.53(543B,272C) Hearing on license denial.** If the commission, upon receipt of a complete and proper application for initial license or reciprocal license, accompanied by the proper fee, shall deny a license to the applicant, the executive secretary shall send written notice to the applicant by regular first-class mail identifying the basis for denial.

**4.53(1)** An applicant denied a license who desires to contest the denial must request a hearing before the commission within 30 days of the date the notice of denial is mailed. A request for a hearing must be in writing and is deemed made on the date of the United States Postal Service postmark or the date of personal service. The request for hearing shall specify the grounds under which the applicant contends that the commission erred in denying the license. If a request for hearing is timely made, the commission shall issue notice of hearing and conduct a contested case hearing.

**4.53(2)** Hearings on license denial shall be open to the public. The burden of presenting evidence and information or documents to support the applicant's position shall be the responsibility of the applicant.

**4.53(3)** The commission, after a hearing on a license denial, may grant or deny the application for a license. If denied, the commission shall state the reasons for denial of the license and may state conditions under which the application for a license could be granted, if applicable.

**4.53(4)** The notice of license denial, request for hearing, notice of hearing, and order are open records available for inspection and copying in accordance with Iowa Code chapter 22. Copies may be provided to the media and other persons or entities.

**4.53(5)** Judicial review of a final order denying a license may be sought in accordance with the provisions of Iowa Code section 17A.19 as amended by 1998 Iowa Acts, chapter 1202, which are applicable to judicial review of the commission's final decision in a contested case.

**193E—4.54(543B) Violations for which civil penalties may be imposed.**

**4.54(1)** Engaging in activities requiring a license when license is inactive.

**4.54(2)** Failing to maintain a place of business.

**4.54(3) Improper care and custody of license:**

a. Failing to properly display license(s).

b. Failing to return license in a timely manner (72 hours).

c. Failing to notify associate when license is returned.

d. Failing to provide mailing address of associate when license is returned.

**4.54(4)** Failing to inform commission and remit required fees if appropriate:

a. When changing business address (5 working days).

b. When changing status (5 working days).

c. When changing form of firm (5 working days).

d. When opening a trust account by not filing a consent to examine for the account.

e. When changing residence address or mailing address.

f. When independently obtained errors and omissions insurance status, coverage or provider changes.

**4.54(5)** Maintaining inadequate transaction records such as:

a. Failing to maintain a general ledger.

b. Failing to maintain individual account ledgers.

c. Failing to retain records on file.

**4.54(6) Improper trust account and closing procedures:**

a. Failing to deposit funds as required.

b. Disbursing trust funds prior to closing without written authorization.

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c. Withholding earnest money unlawfully when the transaction fails to consummate.

d. Failing to obtain escrow agreement for undisbursed funds.

e. Failing to remit and account for interest on closing statements.

f. Computing closing statements improperly.

g. Failing to provide closing statements.

h. Retaining excess personal funds in the trust account.

i. Failing as a salesperson or broker associate to immediately turn funds over to the broker.

j. Failing to deposit trust funds in interest-bearing account in accordance with Iowa Code section 543B.46.

k. Failing to account for and remit to the state accrued interest due in accordance with Iowa Code section 543B.46.

**4.54(7)** Failing to immediately present offer.

**4.54(8)** Advertising without identifying broker or clearly indicating advertisement is by a licensee.

**4.54(9)** Failing to provide information to the commission when requested relative to a complaint (14 calendar days).

**4.54(10)** Failing to obtain all signatures required on contracts or to obtain signatures or initials of all parties to changes in a contract.

**4.54(11)** Placing a sign on property without consent, or failure to remove a sign when requested.

**4.54(12)** Failing to furnish a progress report when requested.

**4.54(13)** Failing by a broker to supervise salespersons or broker associates.

**4.54(14)** Failing by a broker associate or salesperson to keep the employing broker informed.

**4.54(15)** Issuing an insufficient funds check to the commission for any reason or to anyone else in the individual's capacity as a real estate licensee.

**4.54(16)** Issuing an insufficient funds check on the broker's trust account.

**4.54(17)** Engaging in conduct which constitutes a tying arrangement as prohibited by these rules.

**4.54(18)** Failing to inform clients of real estate brokerage firm the date the firm will cease to be in business and the effect upon sellers' listing agreements.

**4.54(19)** Violating any of the remaining provisions in 193E—Chapters 1 to 6 inclusive, which have not heretofore been specified in this rule.

This rule is intended to implement Iowa Code sections 543B.46 and 272C.3(2)“e.”

**193E—4.55(543B) Publication of decisions.** Final decisions of the commission relating to disciplinary procedures may be transmitted to the appropriate professional association(s), other states, and news media.

**193E—4.56(543B) Recovery of hearing fees and expenses.** The commission may assess the licensee with certain fees and expenses relating to a disciplinary hearing, only if the commission finds the licensee did violate Iowa Code chapter 543B or administrative rules of the commission.

**4.56(1)** The commission may assess an amount up to the following costs under this rule:

a. For conducting a disciplinary hearing, an amount not to exceed \$75.

b. All applicable costs involved in the transcript including, but not limited to, the services of the court reporter at the hearing, transcription, duplication, and postage or delivery costs.

c. All normally accepted witness expenses and fee for a hearing or the taking of depositions. This shall include, but

not be limited to, the cost of an expert witness and the cost involved in telephone testimony.

d. All normally applicable costs involved in depositions including, but not limited to, the services of the court reporter recording the deposition, transcription, duplication, and postage or delivery costs.

e. The commission, at its discretion, may assess an appropriate amount up to but not exceeding specific fees established by this subrule and the actual normally acceptable cost, fee or expenses involved.

**4.56(2)** Fees, costs, and expenses assessed pursuant to this rule shall be calculated by the executive secretary or other designated person and may be entered into the commission disciplinary order specifying the amount to be reimbursed and the time period in which the amount assessed must be paid by the licensee.

a. When it is impractical or not possible to include the assessment and time period in the disciplinary order in a timely manner, or the expenditures occur after the disciplinary order, the commission, by majority vote of members present, may assess the amount to be reimbursed and the time period in which payment is to be made by the licensee.

b. If the assessment and time period are not included in the disciplinary order, the commission shall have to the end of the sixth month after the date the state of Iowa paid the expenditure(s) to assess the licensee for such expenditure by commission action.

**4.56(3)** Fees, costs, and expenses assessed by the commission pursuant to this rule shall be allocated to the expenditure category of the licensing commission in which the disciplinary procedure or hearing was incurred. The fees, costs and expenses shall be considered repayment receipts as defined in Iowa Code section 8.2.

**4.56(4)** The failure to comply with payment of a commission-assessed cost, fee, or expense, within the time specified, shall be considered prima facie evidence of a violation of Iowa Code sections 543B.29(3) and 543B.34(2).

However, no action may be taken against the licensee without a hearing as provided in Iowa Code section 543B.35.

**193E—4.57(543B,272C) Reinstatement.** Any person whose license has been revoked or suspended by the board may apply to the commission for reinstatement in accordance with the terms of the order of revocation or suspension.

**4.57(1)** If the order of revocation or suspension did not establish terms upon which reinstatement might occur, or if the license was voluntarily surrendered, an initial application for reinstatement may not be made until one year has elapsed from the date of the order or the date of voluntary surrender.

**4.57(2)** All proceedings for reinstatement shall be initiated by the respondent who shall file with the commission an application for reinstatement of the respondent's license. Such application shall be docketed in the original case in which the license was revoked, suspended, or relinquished. All proceedings upon the petition for reinstatement, including the matters preliminary and ancillary thereto, shall be subject to the same rules of procedure as other cases before the commission.

**4.57(3)** An application for reinstatement shall allege facts which, if established, will be sufficient to enable the commission to determine that the basis of revocation or suspension of the respondent's license no longer exists and that it will be in the public interest for the license to be reinstated. The burden of proof to establish such facts shall be on the respondent.

**4.57(4)** An order of reinstatement shall be based upon a decision which incorporates findings of fact and conclusions

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of law and must be based upon the affirmative vote of not fewer than five members of the commission. This order will be published as provided for in rule 4.55(543B,272C).

**193E—4.58(272C) Impaired licensee review committee.** Pursuant to the authority of Iowa Code section 272C.3(1)“k,” the real estate commission establishes the impaired licensee review committee.

**4.58(1) Definitions.** The following definitions are applicable wherever such terminology is used in the rules regarding the impaired licensee review committee.

“Committee” means the impaired licensee review committee.

“Contract” means the written document establishing the terms for participation in the impaired licensee program prepared by the committee.

“Impairment” means an inability to practice with reasonable safety and skill as a result of alcohol or drug abuse, dependency, or addiction, or any neuropsychological or physical disorder or disability.

“Licensee” means a person licensed under Iowa Code chapter 543B.

“Self-report” means the licensee’s providing written or oral notification to the commission that the licensee has been or may be diagnosed as having an impairment prior to the commission’s receiving a complaint or report alleging the same from a second party.

**4.58(2) Purpose.** The impaired licensee review committee evaluates, assists, monitors, and, as necessary, makes reports to the commission on the recovery or rehabilitation of practitioners who self-report impairments.

**4.58(3) Composition of the committee.** The chairperson of the commission shall appoint the members of the committee. The membership of the committee includes, but is not limited to:

- a. One licensee, who holds a license to practice pursuant to Iowa Code chapter 543B;
- b. One public member of the real estate commission;
- c. One licensed professional with expertise in substance abuse/addiction treatment programs.

**4.58(4) Eligibility.** To be eligible for participation in the impaired licensee recovery program, a licensee must meet all of the following criteria:

- a. The licensee must self-report an impairment or suspected impairment directly to the office of the commission;
- b. The licensee must not have engaged in the unlawful diversion or distribution of controlled substances or illegal substances;
- c. At the time of the self-report, the licensee must not already be under commission order for an impairment or any other violation of the laws and rules governing the practice of the profession;
- d. The licensee has not caused harm or injury to a client;
- e. There is currently no commission investigation of the licensee that the committee determines concerns serious matters related to the ability to practice with reasonable safety and skill or in accordance with the accepted standards of care;
- f. The licensee has not been subject to a civil or criminal sanction, or ordered to make reparations or remuneration by a government or regulatory authority of the United States, this or any other state or territory or foreign nation for actions that the committee determines to be serious infractions of the laws, administrative rules, or professional ethics related to the practice of real estate;
- g. The licensee has provided truthful information and fully cooperated with the commission or committee.

**4.58(5) Meetings.** The committee shall meet as necessary in order to review licensee compliance, develop consent agreements for new referrals, and determine eligibility for continued monitoring.

**4.58(6) Terms of participation.** A licensee shall agree to comply with the terms for participation in the impaired licensee program established in a contract. Conditions placed upon the licensee and the duration of the monitoring period shall be established by the committee and communicated to the licensee in writing.

**4.58(7) Noncompliance.** Failure to comply with the provisions of the agreement shall require the committee to make immediate referral of the matter to the commission for purpose of disciplinary action.

**4.58(8) Practice restrictions.** The committee may impose restrictions on the licensee’s practice as a term of the contract until such time as it receives a report from an approved evaluator that the licensee is capable of practicing with reasonable safety and skill. As a condition of participating in the program, a licensee is required to agree to restricted practice in accordance with the terms specified in the contract. In the event that the licensee refuses to agree to or comply with the restrictions established in the contract, the committee shall refer the licensee to the commission for appropriate action.

**4.58(9) Limitations.** The committee establishes the terms and monitors a participant’s compliance with the program specified in the contract. The committee is not responsible for participants who fail to comply with the terms of or successfully complete the impaired licensee program. Participation in the program under the auspices of the committee shall not relieve the commission of any duties and shall not divest the commission of any authority or jurisdiction otherwise provided. Any violation of the statutes or rules governing the practice of the licensee’s profession by a participant shall be referred to the commission for appropriate action.

**4.58(10) Confidentiality.** The committee is subject to the provisions governing confidentiality established in Iowa Code section 272C.6. Accordingly, information in the possession of the commission or the committee about practitioners in the program shall not be disclosed to the public. Participation in the impaired licensee program under the auspices of the committee is not a matter of public record.

**193E—4.59(252J) Certificates of noncompliance.** The commission shall suspend or revoke a license upon the receipt of a certificate of noncompliance from the child support recovery unit of the department of human services according to the procedures in Iowa Code chapter 252J. In addition to the procedures set forth in chapter 252J, this rule shall apply.

**4.59(1)** The notice required by Iowa Code section 252J.8 shall be served upon the licensee by restricted certified mail, return receipt requested, or personal service in accordance with Rule of Civil Procedure 56.1. Alternatively, the licensee may accept service personally or through authorized counsel.

**4.59(2)** The effective date of revocation or suspension of license, as specified in the notice required by Iowa Code section 252J.8, shall be 60 days following service of the notice upon the licensee.

**4.59(3)** The commission’s executive secretary is authorized to prepare and serve the notice required by Iowa Code section 252J.8, and is directed to notify the licensee that the license will be suspended, unless the registration is already suspended on other grounds. In the event a license is on suspension, the executive secretary shall notify the licensee of the commission’s intention to revoke the license.

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**4.59(4)** Licensees shall keep the commission informed of all court actions and all child support recovery unit actions taken under or in connection with Iowa Code chapter 252J and shall provide the commission copies, within seven days of filing or issuance, of all applications filed with the district court pursuant to Iowa Code section 252J.9, all court orders entered in such actions, and withdrawals of certificates of noncompliance by the child support recovery unit.

**4.59(5)** All commission fees for license renewal or reinstatement must be paid by licensee before a license will be renewed or reinstated after the commission has suspended or revoked the license pursuant to Iowa Code chapter 252J.

**4.59(6)** In the event a licensee files a timely district court action following service of a commission notice pursuant to Iowa Code sections 252J.8 and 252J.9, the commission shall continue with the intended action described in the notice upon the receipt of a court order lifting the stay, dismissing the action, or otherwise directing the commission to proceed. For purposes of determining the effective date of revocation or suspension, the commission shall count the number of days before the action was filed and the number of days after the action was disposed of by the court.

**4.59(7)** The commission shall notify the licensee in writing through regular first-class mail, or such other means as the commission deems appropriate in the circumstances, within ten days of the effective date of the suspension or revocation of a license, and shall similarly notify the licensee when the license is reinstated following the commission's receipt of a withdrawal of the certificate of noncompliance.

**193E—4.60(261) Suspension or revocation of a certificate of registration—student loan.** The commission shall suspend or revoke a license upon receipt of a certificate of noncompliance from the college student aid commission according to the procedures set forth in Iowa Code section 261.126. In addition to those procedures, this rule shall apply.

**4.60(1)** The notice required by Iowa Code section 261.126 shall be served by restricted certified mail, return receipt requested, or by personal service in accordance with the Iowa Rules of Civil Procedure. Alternatively, the registrant may accept service personally or through authorized counsel.

**4.60(2)** The effective date of revocation or suspension of a license, as specified in the notice required by Iowa Code section 261.126, shall be 60 days following service of the notice upon the licensee.

**4.60(3)** The commission's executive secretary is authorized to prepare and serve the notice required by Iowa Code section 261.126, and is directed to notify the licensee that the license will be suspended, unless the license is already suspended on other grounds. In the event a license is on suspension, the executive secretary shall notify the licensee of the commission's intention to revoke the license.

**4.60(4)** Licensees shall keep the commission informed of all court actions and all college student aid commission actions taken under or in connection with Iowa Code chapter 261 and shall provide the commission copies, within seven days of filing or issuance, of all applications filed with the district court pursuant to Iowa Code section 261.127, all court orders entered in such actions, and withdrawals of certificates of noncompliance by the college student aid commission.

**4.60(5)** All commission fees required for license renewal or license reinstatement must be paid by licensee and all continuing education requirements must be met before a license will be renewed or reinstated after the commission has sus-

pending or revoked a license pursuant to Iowa Code chapter 261.

**4.60(6)** In the event a licensee timely files a district court action following service of a commission notice pursuant to Iowa Code sections 261.126 and 261.127, the commission shall continue with the intended action described in the notice upon the receipt of a court order lifting the stay, dismissing the action, or otherwise directing the commission to proceed. For purposes of determining the effective date of the denial of the issuance or renewal of a license, the commission shall count the number of days before the action was filed and the number of days after the action was disposed of by the court.

**4.60(7)** The commission shall notify the licensee in writing through regular first-class mail, or such other means as the commission deems appropriate in the circumstances, within ten days of the effective date of the suspension or revocation of a license, and shall similarly notify the licensee when the license is reinstated following the commission's receipt of a withdrawal of the certificate of noncompliance.

These rules are intended to implement Iowa Code chapters 17A, 252J, 272C, and 543B and Iowa Code sections 261.126 and 261.127.

ITEM 4. Rescind 193E—Chapter 7 and adopt the following new chapter in lieu thereof:

CHAPTER 7  
DECLARATORY ORDERS

**193E—7.1(17A) Petition for declaratory order.** Any person may file a petition with the commission for a declaratory order as to the applicability to specified circumstances of a statute, rule, or order within the primary jurisdiction of the commission at the commission's offices. A petition is deemed filed when it is received by that office. The commission shall provide the petitioner with a file-stamped copy of the petition if the petitioner provides the commission an extra copy for this purpose. The petition must be typewritten or legibly handwritten in ink and must substantially conform to the following form:

REAL ESTATE COMMISSION

Petition by (Name of Petitioner) for Declaratory Order on (Cite provisions of law involved).	}	PETITION FOR DECLARATORY ORDER
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- The petition must provide the following information:
1. A clear and concise statement of all relevant facts on which the order is requested.
  2. A citation and the relevant language of the specific statutes, rules, policies, decisions, or orders whose applicability is questioned, and any other relevant law.
  3. The questions the petitioner wants answered, stated clearly and concisely.
  4. The answers to the questions desired by the petitioner and a summary of the reasons urged by the petitioner in support of those answers.
  5. The reasons for requesting the declaratory order and disclosure of the petitioner's interest in the outcome.
  6. A statement indicating whether the petitioner is currently a party to another proceeding involving the questions at issue and whether, to the petitioner's knowledge, those questions have been directed by, are pending determination by, or are under investigation by, any governmental entity.

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7. The names and addresses of other persons, or a description of any class of persons, known by petitioner to be affected by, or interested in, the questions in the petition.

8. Any request by petitioner for a meeting provided for by 7.7(17A).

The petition must be dated and signed by the petitioner or the petitioner's representative. It must also include the name, mailing address, and telephone number of the petitioner and petitioner's representative, and a statement indicating the person to whom communications concerning the petition should be directed.

**193E—7.2(17A) Notice of petition.** Within 15 days after receipt of a petition for a declaratory order, the commission shall give notice of the petition to all persons not served by the petitioner pursuant to rule 7.6(17A) to whom notice is required by any provision of law. The commission may also give notice to any other persons.

**193E—7.3(17A) Intervention.**

**7.3(1)** Persons who qualify under any applicable provision of law as an intervenor and who file a petition for intervention within 20 days of the filing of a petition for declaratory order shall be allowed to intervene in a proceeding for a declaratory order.

**7.3(2)** Any person who files a petition for intervention at any time prior to the issuance of an order may be allowed to intervene in a proceeding for a declaratory order at the discretion of the commission.

**7.3(3)** A petition for intervention shall be filed at the commission's offices. Such a petition is deemed filed when it is received by that office. The commission will provide the petitioner with a file-stamped copy of the petition for intervention if the petitioner provides an extra copy for this purpose. A petition for intervention must be typewritten or legibly handwritten in ink and must substantially conform to the following form:

REAL ESTATE COMMISSION

Petition by (Name of Original Petitioner) for a Declaratory Order on (Cite provisions of law cited in original petition).	}	PETITION FOR INTERVENTION
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The petition for intervention must provide the following information:

1. Facts supporting the intervenor's standing and qualifications for intervention.
2. The answers urged by the intervenor to the question or questions presented and a summary of the reasons urged in support of those answers.
3. Reasons for requesting intervention and disclosure of the intervenor's interest in the outcome.
4. A statement indicating whether the intervenor is currently a party to any proceeding involving the questions at issue and whether, to the intervenor's knowledge, those questions have been decided by, are pending determination by, or are under investigation by, any governmental entity.
5. The names and addresses of any additional persons, or a description of any additional class of persons, known by the intervenor to be affected by, or interested in, the questions presented.
6. Whether the intervenor consents to be bound by the determination of the matters presented in the declaratory order proceeding.

The petition must be dated and signed by the intervenor or the intervenor's representative. It must also include the name, mailing address, and telephone number of the intervenor and intervenor's representative, and a statement indicating the person to whom communications should be directed.

**193E—7.4(17A) Briefs.** The petitioner or intervenor may file a brief in support of the position urged. The commission may request a brief from the petitioner, any intervenor, or any other person concerning the questions raised in the petition.

**193E—7.5(17A) Inquiries.** Inquiries concerning the status of a declaratory order may be made to the executive secretary of the commission at the commission's offices.

**193E—7.6(17A) Service and filing of petitions and other papers.**

**7.6(1)** When service required. Except where otherwise provided by law, every petition for declaratory order, petition for intervention, brief, or other paper filed in a proceeding for a declaratory order shall be served upon each of the parties of record to the proceeding, and on all other persons identified in the petition for declaratory order or petition for intervention as affected by or interested in the questions presented, simultaneously with its filing. The party filing a document is responsible for service on all parties and other affected or interested persons.

**7.6(2)** Filing—when required. All petitions for declaratory orders, petitions for intervention, briefs, or other papers in a proceeding for a declaratory order shall be filed with the commission at the commission's offices. All petitions, briefs, or other papers that are required to be served upon a party shall be filed simultaneously with the commission.

**7.6(3)** Method of service, time of filing, and proof of mailing. Method of service, time of filing, and proof of mailing shall be as provided by rule 193E—4.28(17A).

**193E—7.7(17A) Commission consideration.** Upon request by petitioner, the commission must schedule a brief and informal meeting between the original petitioner, all intervenors, and the commission, a member of the commission, or a member of the staff of the commission to discuss the questions raised. The commission may solicit comments from any person on the questions raised. Also, comments on the questions raised may be submitted to the commission by any person.

**193E—7.8(17A) Action on petition.**

**7.8(1)** Within the time allowed after receipt of a petition for a declaratory order, the commission shall take action on the petition within 30 days after receipt as required by 1998 Iowa Acts, chapter 1202, section 13(5).

**7.8(2)** The date of issuance of an order or of a refusal to issue an order is as defined in 193E—4.2(543B,17A).

**193E—7.9(17A) Refusal to issue order.** The commission shall not issue a declaratory order where prohibited by 1998 Iowa Acts, chapter 1202, section 13(1), and may refuse to issue a declaratory order on some or all questions raised for the following reasons:

1. The petition does not substantially comply with the required form.
2. The petition does not contain facts sufficient to demonstrate that the petitioner will be aggrieved or adversely affected by the failure of the commission to issue an order.
3. The commission does not have jurisdiction over the questions presented in the petition.
4. The questions presented by the petition are also presented in current rule making, contested case, or other com-

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mission or judicial proceeding that may definitively resolve them.

5. The questions presented by the petition would more properly be resolved in a different type of proceeding or by another body with jurisdiction over the matter.

6. The facts or questions presented in the petition are unclear, overbroad, insufficient, or otherwise inappropriate as a basis upon which to issue an order.

7. There is no need to issue an order because the questions raised in the petition have been settled due to a change in circumstances.

8. The petition is not based upon facts calculated to aid in the planning of future conduct but is, instead, based solely upon prior conduct in an effort to establish the effect of that conduct or to challenge a commission decision already made.

9. The petition requests a declaratory order that would necessarily determine the legal rights, duties, or responsibilities of other persons who have not joined in the petition or filed a similar petition and whose position on the questions presented may fairly be presumed to be adverse to that of petitioner.

10. The petitioner requests the commission to determine whether a statute is unconstitutional on its face.

**7.9(1)** A refusal to issue a declaratory order must indicate the specific grounds for the refusal and constitutes final commission action on the petition.

**7.9(2)** Refusal to issue a declaratory order pursuant to this provision does not preclude the filing of a new petition that seeks to eliminate the grounds for refusal to issue an order.

**193E—7.10(17A) Contents of declaratory order—effective date.** In addition to the order itself, a declaratory order must contain the date of its issuance, the name of petitioner, intervenors, the specific statutes, rules, policies, decisions, or orders involved, the particular facts upon which it is based, and the reasons for its conclusion. A declaratory order is effective on the date of issuance.

**193E—7.11(17A) Copies of orders.** A copy of all orders issued in response to a petition for a declaratory order shall be mailed promptly to the original petitioner and all intervenors.

**193E—7.12(17A) Effect of a declaratory order.** A declaratory order has the same status and binding effect as a final order in a contested case proceeding. It is binding on the commission, the petitioner and any intervenors and is applicable only in circumstances where the relevant facts and the law involved are indistinguishable from those on which the order was based. As to all other persons, a declaratory order serves only as precedent and is not binding on the commission. The issuance of a declaratory order constitutes final commission action on the petition.

**ARC 8850A****REVENUE AND FINANCE  
DEPARTMENT[701]****Notice of Intended Action**

Twenty-five interested persons, a governmental subdivision, an agency or association of 25 or more persons may demand an oral presentation hereon as provided in Iowa Code section 17A.4(1)"b."

Notice is also given to the public that the Administrative Rules Review Committee may, on its own motion or on written request by any individual or group, review this proposed action under section 17A.8(6) at a regular or special meeting where the public or interested persons may be heard.

Pursuant to the authority of Iowa Code section 421.1, the State Board of Tax Review hereby gives Notice of Intended

Action to amend Chapter 1, "State Board of Tax Review—Administration," and Chapter 2, "Conduct of Appeals, Rules of Practice and Procedure," Iowa Administrative Code.

Item 1 amends 701—Chapter 1 by adding new rules pertaining to declaratory orders and petitions for rule making.

Item 2 amends 701—1.2(17A) to provide that decisions by the state board be issued within a reasonable time after submission of the matter to the board.

Item 3 amends 701—Chapter 2 by placing rules 701—2.1(421,17A) to 701—2.23(421,17A) under Division I, entitled "Conduct of Appeals for Proceedings Commenced Before July 1, 1999, and General Rules of Practice and Procedure."

Item 4 amends 701—Chapter 2(421,17A) by creating a Division II entitled "Rules Governing Contested Case Proceedings Commenced on or After July 1, 1999." Under Division II there will be two sections; Section A, entitled "Appeals from Final Contested Case Decisions of or Attributable to the Director of Revenue and Finance," contains rules 701—2.24(421,17A) to 701—2.38(421,17A). Division II, Section B, entitled "Rules Governing Contested Case Proceedings in which the State Board has Original Jurisdiction to Commence a Contested Case Proceeding," contains rules 701—2.39(421,17A) to 701—2.76(421,17A).

The proposed amendments will not necessitate additional expenditures with political subdivisions or agencies and entities which contract with political subdivisions.

The Department has determined that these proposed amendments may have an impact on small business. The Department has considered the factors listed in Iowa Code section 17A.31(4). The Department will issue a regulatory flexibility analysis as provided in Iowa Code sections 17A.31 to 17A.33 if a written request is filed by delivery or by mailing postmarked no later than April 13, 1999, to the Policy Section, Compliance Division, Department of Revenue and Finance, Hoover State Office Building, P.O. Box 10457, Des Moines, Iowa 50306. The request may be made by the Administrative Rules Review Committee, the Governor, a political subdivision, at least 25 persons who qualify as a small business under Iowa Code sections 17A.31 to 17A.33, or an organization of small businesses representing at least 25 persons which is registered with this agency under Iowa Code sections 17A.31 to 17A.33.

Any interested person may make written suggestions or comments on these proposed amendments on or before April 23, 1999. Such written comments should be directed to the Policy Section, Compliance Division, Department of Revenue and Finance, Hoover State Office Building, P.O. Box 10457, Des Moines, Iowa 50306.

Persons who want to orally convey their views should contact the Policy Section, Compliance Division, Department of Revenue and Finance, at (515)281-4250 or at the Department of Revenue and Finance offices on the fourth floor of the Hoover State Office Building.

Requests for a public hearing must be received by April 16, 1999.

These amendments are intended to implement 1998 Iowa Acts, chapter 1202.

The following amendments are proposed.

ITEM 1. Amend rule 701—1.2(17A) as follows:

**701—1.2(17A) Time for issuing a decision.** The board shall issue its decisions in writing in matters considered by it on appeal within ~~60 days~~ a reasonable time after the matter has been submitted to the board. The term "submitted to the board" means that time in the appeal proceeding when all the

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evidence in the matter on appeal has been taken, motions by counsel have been ruled upon, the arguments of counsel made, and all briefs have been submitted to the board or the time for submitting briefs has expired. See Iowa Code subsection 4.1(22) (34) for computation time and Emmetsburg Ready Mix Co. v. Norris, 362 N.W.2d 498 (Iowa 1985), when the last day for filing falls on a holiday.

This rule is intended to implement Iowa Code sections 17A.22 and 421.1(4).

ITEM 2. Amend 701—Chapter 1(17A) by adding the following new rules:

701—1.3(17A) Declaratory orders. The state board will not consider or rule upon petitions for declaratory orders as to the applicability of any statutory provision, rule or other written statement of law or policy, decision or order. Upon request, the state board may review a ruling of the department of revenue and finance disposing of a petition for a declaratory order properly submitted to the department of revenue and finance.

This rule is intended to implement Iowa Code sections 421.1 and 441.49 and chapter 17A as amended by 1998 Iowa Acts, chapter 1202.

701—1.4(17A) Petitions for rule making. The state board will not consider any petitions of interested persons requesting the promulgation, amendment or repeal of a substantive tax rule. Such petitions should be submitted to the department of revenue and finance. The board will, however, consider and dispose of petitions of interested persons requesting the amendment or repeal of procedural or administrative rules of the state board of topics covered in Chapter 1 or 2 of these rules or the promulgation of such rules.

This rule is intended to implement Iowa Code sections 421.1 and 441.49 and chapter 17A as amended by 1998 Iowa Acts, chapter 1202.

ITEM 3. Amend 701—Chapter 2(421,17A) by placing rules 701—2.1(421,17A) to 701—2.23(17A) under a new heading as follows:

DIVISION I  
CONDUCT OF APPEALS FOR PROCEEDINGS COMMENCED  
BEFORE JULY 1, 1999, AND GENERAL RULES OF  
PRACTICE AND PROCEDURE

ITEM 4. Amend 701—Chapter 2(421,17A) by creating a Division II following current rule 701—2.23(17A). Division II will be:

DIVISION II  
RULES GOVERNING CONTESTED CASE PROCEEDINGS  
COMMENCED ON OR AFTER JULY 1, 1999

Section A

Appeals from Final Contested Case Decisions of or  
Attributable to the Director of Revenue and Finance

701—2.24(421,17A) Definitions. For the purposes of Division II, Section A, the following definitions shall govern:

“Board” or “state board” shall refer to the state board of tax review created by chapter 342 of the Acts of the Sixty-second General Assembly.

“Department” shall refer to the department of revenue and finance.

“Director” shall refer to the director of the department of revenue and finance.

“Secretary” shall refer to the secretary of the state board of tax review.

701—2.25(421,17A) Notice of appeal. Jurisdiction is conferred upon the state board by giving written notice to the department within 30 days of the rendering of the decision, order or directive from which such appeal is taken.

Notice of appeal may be given by certified mail with return receipt requested addressed to the department of revenue and finance to the attention of the director; or by service on the director or an assistant director as provided by the Iowa Rules of Civil Procedure.

Notice shall be proved by affidavit of mailing signed by appellant or the appellant’s duly authorized representative, with return receipt and a copy of the notice attached filed with the secretary or, filing with the secretary a copy of the notice of appeal with return of service attached.

This rule is intended to implement Iowa Code sections 421.2 and 441.49 and chapter 17A as amended by 1998 Iowa Acts, chapter 1202.

701—2.26(421,17A) Contents of notice of appeal. The written notice of appeal shall contain a caption in the following form:

BEFORE THE IOWA STATE BOARD OF TAX REVIEW  
HOOVER STATE OFFICE BUILDING  
DES MOINES, IOWA

IN THE MATTER OF \_\_\_\_\_  
\_\_\_\_\_  
(state taxpayer’s name, address  
and designate type of proceeding,  
e.g., income tax refund  
claim). } NOTICE OF  
APPEAL  
DOCKET NO. \_\_\_\_\_  
(filled in by Board)

The notice of appeal shall substantially state in separate numbered paragraphs the following:

1. The appellant’s name and legal residence;
2. The date the director’s decision, order or directive was issued;
3. The amount of assessment or refund denial, nature of tax, year or other period, date of assessment or refund denial, and approximate amount of total tax liability in controversy;
4. A clear and concise assignment of each and every error;
5. A clear and concise statement of the facts upon which the affected taxpayer relies as sustaining the assignment of error;
6. The relief requested;
7. The signature of affected taxpayer or counsel, together with address to which all subsequent correspondence, notice or papers shall be served or mailed.

701—2.27(421,17A) Certification by director. Within 30 days after notice of appeal is given, the director shall certify to the board all records, documents, reports, audits, a copy of the decision, order or directive from which appeal is taken, and all other information pertinent thereto.

701—2.28(421,17A) Motions. All motions shall be in writing and shall be filed with the secretary of the state board within 30 days after the filing of the pleading attached and shall set forth the reasons and grounds thereof. The state board shall act upon such motions as justice may require. Motions based on matters which do not appear of record shall be supported by affidavit.

701—2.29(421,17A) Answer. An answer shall be filed with the secretary of the state board within 30 days after the filing of pleading responded to, unless attached by motion as pro-

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vided in rule 701—2.28(421,17A), and then the answer shall be filed within 30 days after the date on which the state board issues a ruling on said motion.

**701—2.30(421,17A) Docketing.** Appeals shall be assigned consecutive file numbers. The state board shall cause to be kept a well-bound, blank record book with suitable index.

There shall be entered therein each action and each act done with the proper dates as follows:

1. The title of the appeal;
2. Brief statement of the type of tax, year or period, date of assessment or refund denial, and the amount involved including tax, penalty, interest, and costs;
3. The manner and time of service of notice of appeal;
4. The appearance of all parties;
5. Notice of hearing, together with manner and time of service; and
6. The decision of the state board or other disposition of the case and the date thereof.

**701—2.31(421,17A) Filing of papers.** After proof of notice has been filed, all motions, pleadings, briefs and other papers to be filed shall be in quadruplicate with the secretary who shall send copies to members of the state board and to all other parties of record, unless represented by counsel of record, then to such counsel.

**701—2.32(421,17A) Hearing an appeal.** In the event that the case consists of a review by the board of a decision of or attributable to the director in a contested case proceeding, the board will only consider those issues or selected issues actually presented at the contested case proceeding where such issues were of the type which by statute were entrusted to the director for determination. Further, in such review of the decision of or attributable to the director on these issues presented at the contested case proceeding, the board shall not itself hear any further evidence with respect to those issues, but it shall afford each party an opportunity to present briefs and oral arguments.

This rule is intended to implement Iowa Code sections 421.1(4) and 17A.15(5).

**701—2.33(421,17A) Appearances by appellant.** Any appellant may appear in person or, in the case of corporations, partnerships or other associations, by its duly authorized representative, or by an attorney-at-law or a certified public accountant authorized to practice in the state of Iowa.

**701—2.34(421) Authority of state board to enter issue procedural orders.** The state board or member of the state board may issue preliminary orders regarding procedural matters. The secretary for the state board shall immediately mail a copy of any such preliminary order entered under this rule to the two members of the board who did not participate in the order. All orders entered under this rule shall become the action of the board unless both members of the board who did not participate in the order notify the secretary of their objection within five days of its receipt by them. If both members of the board who did not participate in the order timely object, then the order shall be null and void. The secretary shall notify the parties of the order entered under this rule, when it becomes the order of the board. The chairperson, or other member designated by the chairperson, may grant a continuance of the hearing on appeal for "good cause" even though there is insufficient time before the scheduled hearing for other members of the board to object to the continuance.

**701—2.35(421,17A) Continuances.** Any hearing may be continued for "good cause." Requests for continuance prior

to the hearing shall be in writing, promptly filed with the state board immediately upon the cause becoming known.

**701—2.36(421,17A) Place of hearing.** Unless otherwise designated by the state board, the hearing shall be held in the office of the State Board of Tax Review, Hoover State Office Building, Des Moines, Iowa 50319.

**701—2.37(421,17A) Members participating.** All appeals shall be heard by a minimum of two members of the state board. Orders and decisions shall be signed by one member of the board and shall name members participating. Decisions shall affirm, modify, remand, or reverse the decision, order or directive appealed from. A majority decision by the state board shall govern and control. Written dissenting decisions may be filed.

**701—2.38(421,17A) Presiding officer.** The chairperson of the state board, or a designated member shall preside at the hearing.

## Section B

Rules Governing Contested Case Proceedings in which the State Board Has Original Jurisdiction to Commence a Contested Case Proceeding

**701—2.39(421,17A) Applicability and scope.** The rules set forth under Division II, Section B, govern the proceedings for all cases in which the state board has original jurisdiction to commence a contested case proceeding. The rules within Division II, Section B, govern all such cases for which the state board has original jurisdiction and which are commenced on or after July 1, 1999.

**701—2.40(17A) Definitions.** For the purposes of Division II, Section B, the following definitions shall govern:

"Board" or "state board" shall refer to the state board of tax review created by chapter 342 of the Acts of the Sixty-second General Assembly.

"Contested case" means a proceeding defined by Iowa Code section 17A.2(5), over which the state board of tax review has original jurisdiction to commence a contested case proceeding and includes any matter defined as a no factual dispute contested case under 1998 Iowa Acts, chapter 1202, section 14.

"Department" means the department of revenue and finance.

"Department of inspections and appeals" means the state department created by Iowa Code chapter 10A.

"Director" means the director of the department or the director's authorized representative.

"Division of administrative hearings" means the division of the department of inspections and appeals responsible for holding contested case proceedings pursuant to Iowa Code chapter 10A.

"Issuance" means the date of mailing of a decision or order or date of delivery if service is by other means unless another date is specified in the order.

"Party" means each person or agency named or admitted as a party or properly seeking and entitled as of right to be admitted as a party.

"Person" means any individual, estate, trust, fiduciary, partnership including limited liability partnership, corporation including limited liability corporation, association, governmental subdivision, or public or private organization of any character or any other person covered by the Act other than an agency.

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“Presiding officer” means the members of the state board officiating over the contested case proceedings or, if the notice of appeal is transferred, an administrative law judge employed by the division of administrative hearings of the department of inspections and appeals.

“Proposed decision” means the presiding officer’s recommended findings of fact, conclusions of law, decision, and order in a contested case.

**701—2.41(421,17A) Time requirements.** Time shall be computed as provided in Iowa Code section 4.1(34).

**701—2.42(421,17A) Notice of appeal.** Jurisdiction is conferred upon the state board by giving written notice to the department within 30 days of the rendering of the decision, order, or directive from which such appeal is taken. However, the state board does not have jurisdiction with regard to a final equalization notice issued pursuant to Iowa Code section 441.49, unless written notice is given within ten days of the date of the order in accordance with rule 701—71.15(441).

Notice of appeal may be given by certified mail with return receipt requested addressed to the department of revenue and finance to the attention of the director or by service on the director or an assistant director as provided by the Iowa Rules of Civil Procedure.

Notice shall be proved by affidavit of mailing signed by appellant or the appellant’s duly authorized representative, with return receipt and a copy of the notice attached filed with the secretary or, filing with the secretary a copy of the notice of appeal with return of service attached.

This rule is intended to implement Iowa Code sections 421.2, 441.49 and chapter 17A as amended by 1998 Iowa Acts, chapter 1202.

**701—2.43(421,17A) Contents of notice of appeal.** The written notice of appeal shall contain a caption in the following form:

BEFORE THE STATE BOARD OF TAX REVIEW  
HOOVER STATE OFFICE BUILDING  
DES MOINES, IOWA

IN THE MATTER OF _____	}	NOTICE OF
(state taxpayer’s name, address and designate type of proceeding e.g., income tax refund claim).		APPEAL
		DOCKET NO. _____
		(filled in by Board)

The notice of appeals shall substantially state in separate numbered paragraphs the following:

1. The appellant’s name and legal residence;
2. The date appellant received the director’s decision, order, or directive;
3. The amount of assessment, nature of tax, year or other period, date of assessment, and approximate amount of total tax liability in controversy;
4. A clear and concise assignment of each and every error;
5. A clear and concise statement of the facts upon which the affected taxpayer relies as sustaining the assignment of error;
6. The relief requested;
7. The signature of affected taxpayer or counsel, together with address to which all subsequent correspondence, notice or papers shall be served or mailed.

**701—2.44(421,17A) Certification by director.** Within 30 days after notice of appeal is given the director shall certify to the board all records, documents, reports, audits, a copy of the decision, order or directive from which appeal is taken, and all other information pertinent thereto.

**701—2.45(421,17A) Answer.** An answer shall be filed with the secretary of the state board within 30 days after the filing of pleading responded to, unless attached by motion as provided in Division II, Section A, rule 701—2.28(421,17A), and then the answer shall be filed within 30 days after the date on which the board issues a ruling on said motion.

**701—2.46(421,17A) Docketing.** Appeals shall be assigned consecutive file numbers. The state board shall cause to be kept a well-bound, blank record book with suitable index.

There shall be entered therein each action and each act done with the proper dates as follows:

1. The title of the appeal;
2. Brief statement of the type of tax, year or period, date of assessment, and the amount involved including tax, penalty, interest and costs;
3. The manner and time of service of notice of appeal;
4. The appearance of all parties;
5. Notice of hearing, together with manner and time of service; and
6. The decision of the state board or other disposition of the case and the date thereof.

**701—2.47(421,17A) Appearances by appellant.** Any appellant may appear in person or, in the case of corporations, partnerships or other associations, by its duly authorized representative, or by an attorney-at-law or a certified public accountant authorized to practice in the state of Iowa.

**701—2.48(421,17A) Place of hearing.** Unless otherwise designated by the state board, the hearing shall be held in the office of the State Board of Tax Review, Hoover State Office Building, Des Moines, Iowa 50319.

**701—2.49(421,17A) Transcript of hearing.** Hearings shall be stenographically reported and a transcript thereof shall be made if, in the opinion of the state board, a permanent record is deemed necessary. Either party may provide a certified court reporter at their own expense.

**701—2.50(421,17A) Requests for contested case.** Any party may request commencement of a contested case proceeding by filing a written request for such a proceeding after the notice of appeal and answer has been filed.

**701—2.51(421,17A) Notice of hearing.**

**2.51(1) Delivery.** Delivery of the notice of hearing constitutes the commencement of the contested case proceeding. Delivery may be executed by:

- a. Personal service as provided in the Iowa Rules of Civil Procedure;
- b. Certified mail, return receipt requested;
- c. First-class mail; or
- d. Publication, as provided in the Iowa Rules of Civil Procedure.

**2.51(2) Contents.** The notice of hearing shall contain the following information:

- a. A statement of the time, place, and nature of the hearing;
- b. A statement of legal authority and jurisdiction under which the hearing is to be held;
- c. A reference to the particular sections of the statutes and rules involved;

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d. A short and plain statement of the matters asserted. If the state board or other party is unable to state the matters in detail at the time the notice is served, the initial notice may be limited to a statement of the issues involved. Thereafter, upon application, a more definite and detailed statement shall be furnished;

e. Identification of all parties including the name, address and telephone number of the parties' representatives where known;

f. Reference to the procedural rules governing conduct of the contested case proceeding;

g. Identification of the presiding officer, if known. If not known, a description of who will serve as presiding officer;

h. Notification of the time period in which a party may request, pursuant to 1998 Iowa Acts, chapter 1202, section 15(1), and 701—2.52(421,17A), that the presiding officer be an administrative law judge; and

i. Whether the state board on its own motion has decided to transfer the case to the division of administrative hearings.

**701—2.52(17A) Presiding officer.**

**2.52(1) Request.** Any party who wishes to request that the presiding officer assigned to render a proposed decision be an administrative law judge employed by the department of inspections and appeals must file a written request within 20 days after service of a request for commencement of a contested case proceeding as provided in rule 701—2.50(421, 17A).

**2.52(2)** The state board may deny the request only upon a finding that one or more of the following apply:

a. There is a compelling need to expedite issuance of a final decision in order to protect the public health, safety, or welfare;

b. An administrative law judge with the qualifications identified in subrule 2.52(4) is unavailable to hear the case within a reasonable time;

c. The case involves significant policy issues of first impression that are inextricably intertwined with the factual issues presented;

d. The demeanor of the witnesses is likely to be dispositive in resolving the disputed factual issues;

e. Funds are unavailable to pay the costs of an administrative law judge and an interagency appeal;

f. The request was not timely filed;

g. The request is not consistent with a specified statute; or

h. The state board based on its discretion may wish to retain the case due to the subject matter of the case or issues involved in the case.

**2.52(3) Ruling on request.** The state board shall issue a written ruling specifying the grounds for its decision within 20 days after a request for an administrative law judge is filed. If the ruling is contingent upon the availability of an administrative law judge with the qualifications identified in subrule 2.52(4), the parties shall be notified at least ten days prior to the hearing if a qualified administrative law judge will not be available.

**2.52(4) Qualifications of the administrative law judge.** An administrative law judge assigned to act as a presiding officer in a case in which the state board has original jurisdiction shall have the following technical expertise unless waived by the state board: The administrative law judge must be an attorney licensed to practice law in the state of Iowa and, based on the discretion of the state board, possess sufficient technical expertise in the area of taxation and re-

lated matters to be capable of rendering a fair and competent decision in such cases.

**2.52(5) Appeal of proposed decision by the administrative law judge.** Except as provided otherwise by another provision of law, all rulings by an administrative law judge acting as presiding officer are subject to appeal to the state board. A party must seek any available interagency appeal in order to exhaust adequate administrative remedies.

**2.52(6) Review of interagency appeals.** Unless otherwise provided by law, members of the state board, when reviewing a proposed decision upon interagency appeal, shall have the powers of Division II, Section B, which apply to presiding officers.

**701—2.53(421,17A) Transfer of case for hearing or appeal.** The secretary for the state board shall transfer the case file to the division of administrative hearings within 30 days of the date of a determination by the state board that the case should be transferred. The parties to the case shall be notified at least ten days prior to the hearing if a qualified administrative law judge will be available.

The administrative hearings division shall, upon issuance of a proposed decision, promptly forward the record of the contested case proceeding and all other papers associated with the case to the state board, if no timely motion to vacate under rule 701—2.68(421,17A) is filed. If such a motion is filed, the record shall be promptly forwarded after the motion to vacate is denied or a proposed decision is rendered on the merits.

**701—2.54(17A) Waiver of procedures.** Unless otherwise precluded by law, the parties in a contested case proceeding may waive any provision of Division II, Section B. However, the state board in its discretion may refuse to give effect to such a waiver when it deems the waiver to be inconsistent with the public interest.

**701—2.55(17A) Telephone proceedings.** The presiding officer may resolve preliminary procedural motions by telephone conference in which all parties have an opportunity to participate. Other telephone proceedings may be held with the consent of all parties. The presiding officer will determine the location of the parties and witnesses for telephone hearings. The convenience of the witnesses or parties, as well as the nature of the case, will be considered when location is chosen.

**701—2.56(421,17A) Disqualifications.**

**2.56(1)** A presiding officer or other person shall withdraw from participation in the making of any proposed or final decision in a contested case if that person:

a. Has a personal bias or prejudice concerning a party or a representative of a party;

b. Has personally investigated, prosecuted or advocated in connection with that case, the specific controversy underlying that case, or another pending factually related contested case, or a pending factually related controversy that may culminate in a contested case involving the same parties;

c. Is subject to the authority, direction, or discretion of any person who has personally investigated, prosecuted, or advocated in connection with that contested case, the specific controversy underlying that contested case, or a pending factually related contested case or controversy involving the same parties;

d. Has acted as counsel to any person who is a private party to that proceeding within the past two years;

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e. Has a personal financial interest in the outcome of the case or any other significant personal interest that could be substantially affected by the outcome of the case;

f. Has a spouse or relative within the third degree of relationship that: (1) is a party to the case, or an officer, director or trustee of a party; (2) is a lawyer in the case; (3) is known to have an interest that could be substantially affected by the outcome of the case; or (4) is likely to be a material witness in the case; or

g. Has any other legally sufficient cause to withdraw from participation in the decision making in that case.

**2.56(2)** Personally investigated. The term "personally investigated" means taking affirmative steps to interview witnesses directly or to obtain documents or other information directly. The term "personally investigated" does not include general direction and supervision of assigned investigators, unsolicited receipt of information which is relayed to assigned investigators, review of another person's investigative work product in the course of determining whether there is probable cause to initiate a proceeding, or exposure to factual information while performing other functions of the state board, including fact gathering for purposes other than investigation of the matter which culminates in a contested case. Factual information relevant to the merits of a contested case received by a person who later serves as presiding officer or a member of the state board shall be disclosed if required by 1998 Iowa Acts, chapter 1202, section 19(3), subrule 2.56(3), and 701—2.69(421,17A).

**2.56(3)** Withdrawal. In a situation where a presiding officer or other person knows of information which might reasonably be deemed to be a basis for disqualification and decides voluntary withdrawal is unnecessary, that person shall submit the relevant information for the record by affidavit and shall provide for the record a statement of the reasons for the determination that withdrawal is unnecessary.

**2.56(4)** Motion for disqualification. If a party asserts disqualification on any appropriate ground, including those listed in subrule 2.56(1), the party shall file a motion supported by an affidavit pursuant to 1998 Iowa Acts, chapter 1202, section 19(7). The motion must be filed as soon as practicable after the reason alleged in the motion becomes known to the party. If, during the course of the hearing, a party first becomes aware of evidence of bias or other grounds for disqualification, the party may move for disqualification but must establish the grounds by the introduction of evidence into the record.

If the presiding officer determines that disqualification is appropriate, the presiding officer or other person shall withdraw. If the presiding officer determines that withdrawal is not required, the presiding officer shall enter an order to that effect. A party asserting disqualification may seek an interlocutory appeal under 701—2.71(421,17A) and seek a stay under 701—2.75(421,17A).

### **701—2.57(421,17A) Consolidation and severance.**

**2.57(1)** Consolidation. The presiding officer may consolidate any or all matters at issue in two or more contested case proceedings where: (a) the matters at issue involve common parties or common questions of fact or law; (b) consolidation would expedite and simplify consideration of the issues involved; and (c) consolidation would not adversely affect the rights of any of the parties to those proceedings.

**2.57(2)** Severance. The presiding officer may, for good cause shown, order any contested case proceedings or portions thereof severed.

### **701—2.58(17A) Service and filing of pleadings and other papers.**

**2.58(1)** When service is required. Except where otherwise provided by law, every pleading, motion, document, or other paper filed in a contested case proceeding and every paper relating to discovery in such a proceeding shall be served upon each of the parties of record to the proceeding simultaneously with their filing. Except for the original notice of hearing and an application for rehearing as provided in Iowa Code section 17A.16(2), the party filing a document is responsible for service on all parties.

**2.58(2)** Service—how made. Service upon a party represented by an attorney shall be made upon the attorney unless otherwise ordered. Service is made by delivery or by mailing a copy to the person's last-known address. Service by mail is complete upon mailing, except where otherwise specifically provided by statute, rule, or order.

**2.58(3)** Filing—when required. All pleadings, motions, documents or other papers in a contested case proceeding shall be filed with Secretary for the State Board of Tax Review, Hoover State Office Building, Fourth Floor, Des Moines, Iowa 50319. All pleadings, motions, documents or other papers that are required to be served upon a party shall be filed simultaneously with the state board and the address for the secretary of the state board as previously stated. However, once an administrative law judge becomes a presiding officer, thereafter, such papers will be filed with that administrative law judge.

**2.58(4)** Filing—when made. Except where otherwise provided by law, a document is deemed filed at the time it is delivered to the Secretary of the State Board of Tax Review, Hoover State Office Building, Fourth Floor, Des Moines, Iowa 50319, delivered to an established courier service for immediate delivery to that office, or mailed by first-class mail or state interoffice mail to that office, so long as there is proof of mailing. However, when a filing is made with an administrative law judge, a document is deemed filed on the date when delivery to the administrative law judge occurs using one of the methods set forth in this subrule.

**2.58(5)** Proof of mailing. Proof of mailing includes either: a legible United States Postal Service postmark on the envelope, a certificate of service, a notarized affidavit, or a certification in substantially the following form:

I certify under penalty of perjury and pursuant to the laws of Iowa that, on (date of mailing), I mailed copies of (describe document) addressed to the (agency office and address) and to the names and addresses of the parties listed below by depositing the same in (a United States post office mailbox with correct postage properly affixed or state interoffice mail).

(Date) (Signature)

### **701—2.59(421,17A) Discovery.**

**2.59(1)** Discovery procedure. Discovery procedures applicable in civil actions are applicable in contested cases. Unless lengthened or shortened by these rules or by order of the presiding officer, time periods for compliance with discovery shall be as provided in the Iowa Rules of Civil Procedure.

**2.59(2)** Discovery motions. Any motion relating to discovery shall allege that the moving party has previously made a good-faith attempt to resolve the discovery issues involved with the opposing party. Motions in regard to discovery shall be ruled upon by the presiding officer. Opposing parties shall be afforded the opportunity to respond within ten days of the filing of the motion unless the time is shortened as provided in the above subrule 2.59(1). The presiding

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officer may rule on the basis of the written motion and any response, or may order argument on the motion.

**2.59(3) Admissibility of evidence.** Evidence obtained in discovery may be used in the contested case proceeding if that evidence would otherwise be admissible in that proceeding.

**701—2.60(421,17A) Subpoenas.****2.60(1) Issuance.**

a. A subpoena shall be issued to a party on request. Such a request must be in writing. In the absence of good cause for permitting later action, a request for a subpoena must be received at least three days before the scheduled hearing. The request shall include the name, address, and telephone number of the requesting party.

b. Except to the extent otherwise provided by law, parties are responsible for service of their own subpoenas and payment of witness fees and mileage expenses.

**2.60(2) Motion to quash or modify.** The presiding officer may quash or modify a subpoena for any lawful reason upon motion in accordance with the Iowa Rules of Civil Procedure. A motion to quash or modify a subpoena shall be set for argument promptly.

**701—2.61(421,17A) Motions.**

**2.61(1) Form.** No technical form for motions is required. However, prehearing motions must be in writing, state the grounds for relief, and state the relief sought.

**2.61(2) Response.** Any party may file a written response to a motion within ten days after the motion is served, unless the time period is extended or shortened by rules of the agency or the presiding officer. The presiding officer may consider a failure to respond within the required time period in ruling on a motion.

**2.61(3) Oral argument.** The presiding officer may schedule oral argument on any motion.

**2.61(4) Motions pertaining to the hearing, except motions for summary judgment, must be filed and served at least ten days prior to the date of hearing unless there is good cause for permitting later action or the time for such action is lengthened or shortened by rule of the state board or an order of the presiding officer.**

**2.61(5) Motions for summary judgment.** Motions for summary judgment shall comply with requirements of Iowa Rule of Civil Procedure 237 and shall be subject to disposition according to the requirements of that rule to the extent such requirements are not inconsistent with the provisions of this rule or any other provision of law governing the procedure in contested cases.

Motions for summary judgment must be filed and served at least 45 days prior to the scheduled hearing date, or other time period determined by the presiding officer. Any party resisting the motion shall file and serve a resistance within 15 days, unless otherwise ordered by the presiding officer, from the date a copy of the motion was served. The time fixed for hearing or written submission shall be not less than 20 days after the filing of the motion, unless a shorter time is ordered by the presiding officer. A summary judgment order rendered on all issues in a contested case is subject to appeal or rehearing pursuant to rules 701—2.73(421,17A) and 701—2.74(421,17A).

**701—2.62(421,17A) Prehearing conference.**

**2.62(1) Request.** Any party may request a prehearing conference. A written request for prehearing conference or an order for prehearing conference on the presiding officer's own motion shall be filed not less than seven days prior to the

hearing date. A prehearing conference shall not be scheduled less than three business days prior to the hearing date.

Written notice of the prehearing conference shall be given by the state board to all parties. For good cause the presiding officer may permit variances from this rule.

**2.62(2) Prehearing information.** Each party shall bring to the prehearing conference:

a. A final list of the witnesses who the party anticipates will testify at hearing. Witnesses not listed may be excluded from testifying unless there was good cause for the failure to include their names;

b. A final list of exhibits which the party anticipates will be introduced at hearing. Exhibits other than rebuttal exhibits that are not listed may be excluded from admission into evidence unless there was good cause for the failure to include them; and

c. Witness or exhibit lists may be amended subsequent to the prehearing conference within the time limits established by the presiding officer at the prehearing conference. Any such amendments must be served on all parties.

**2.62(3) Permissible prehearing conference actions.** In addition to the requirements of subrule 2.62(2), the parties at a prehearing conference may:

a. Enter into stipulations of law or fact;

b. Enter into stipulations on the admissibility of exhibits;

c. Identify matters which the parties intend to request be officially noticed;

d. Enter into stipulations for waiver of any provision of law; and

e. Consider any additional matters which will expedite the hearing.

**2.62(4) Telephone.** Prehearing conferences shall be conducted by telephone unless otherwise ordered. Parties shall exchange and receive witness and exhibit lists in advance of a telephone prehearing conference.

**701—2.63(421,17A) Continuances.** Unless otherwise provided, applications for continuances shall be made to the presiding officer.

**2.63(1) Application.** A written application for a continuance shall:

a. Be made at the earliest possible time and no less than seven days before the hearing except in case of unanticipated emergencies;

b. State the specific reasons for the request; and

c. Be signed by the requesting party or the party's representative.

An oral application for a continuance may be made if the presiding officer waives the requirement for a written motion. However, a party making such an oral application for a continuance must confirm that request by written application within five days after the oral request unless that requirement is waived by the presiding officer. No application for continuance shall be made or granted without notice to all parties except in an emergency where notice is not feasible.

**2.63(2) Factors in determining a continuance.** In determining whether to grant a continuance, the presiding officer may consider:

a. Prior continuances;

b. The interests of all parties;

c. The likelihood of informal settlement;

d. The existence of an emergency;

e. Any objection;

f. Any applicable time requirements;

g. The existence of a conflict in the schedules of counsel, parties, or witnesses;

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- h. The timeliness of the request; and
- i. Other relevant factors.

The presiding officer may require documentation of any grounds for continuance.

**701—2.64(17A) Withdrawals.** A party requesting a contested case proceeding may withdraw that request prior to the hearing. Unless otherwise provided, a withdrawal shall be with prejudice.

**701—2.65(421,17A) Intervention.**

**2.65(1) Motion.** A motion for leave to intervene in a contested case proceeding shall state the grounds for the proposed intervention, the position and interest of the proposed intervenor, and the possible impact of intervention on the proceeding. A proposed answer or petition in intervention shall be attached to the motion. Any party may file a response within 14 days of service of the motion to intervene unless the time period is extended or shortened by the presiding officer.

**2.65(2) When filed.** Motion for leave to intervene shall be filed as early in the proceeding as possible to avoid adverse impact on existing parties or the conduct of the proceeding. Unless otherwise ordered, a motion for leave to intervene shall be filed before the prehearing conference, if any, or at least 20 days before the date scheduled for hearing. Any later motion must contain a statement of good cause for the failure to file in a timely manner. Unless inequitable or unjust, an intervenor shall be bound by any agreement, arrangement, or other matter previously raised in the case. Requests by untimely intervenors for continuances which would delay the proceeding will ordinarily be denied.

**2.65(3) Grounds for intervention.** The movant shall demonstrate that: (a) intervention would not unduly prolong the proceedings or otherwise prejudice the rights of existing parties; (b) the movant is likely to be aggrieved or adversely affected by a final order in the proceeding; and (c) the interests of the movant are not adequately represented by existing parties.

**2.65(4) Effect of intervention.** If appropriate, the presiding officer may order consolidation of the petitions and briefs of different parties whose interests are aligned with each other and limit the number of representatives allowed to participate actively in the proceedings. A person granted leave to intervene is a party to the proceeding. The order granting intervention may restrict the issues that may be raised by the intervenor or otherwise condition the intervenor's participation in the proceeding.

**701—2.66(421,17A) Hearing procedures.**

**2.66(1) Authority of presiding officer.** The presiding officer presides at the hearing, and may rule on motions, require briefs, issue a decision, and issue such orders and rulings as will ensure the orderly conduct of the proceedings.

**2.66(2) Objections.** All objections shall be timely made and stated on the record.

**2.66(3) Representation.** Parties have the right to participate or to be represented in all hearings or prehearing conferences related to their case. Partnerships, corporations, or associations may be represented by any member, officer, director, or duly authorized agent. Any party may be represented by an attorney or another person authorized by law.

**2.66(4) Participation in hearing.** Subject to terms and conditions prescribed by the presiding officer, parties have the right to introduce evidence on issues of material fact, cross-examine witnesses present at the hearing as necessary for a full and true disclosure of the facts, present evidence in rebuttal, and submit briefs and engage in oral argument.

**2.66(5)** The presiding officer shall maintain the decorum of the hearing and may refuse to admit or may expel anyone whose conduct is disorderly.

**2.66(6) Sequestration.** Witnesses may be sequestered during the hearing.

**2.66(7) Conduct of the hearing.** The presiding officer shall conduct the hearing in the following manner:

- a. The presiding officer shall give an opening statement briefly describing the nature of the proceedings;
- b. The parties shall be given an opportunity to present opening statements;
- c. Parties present their cases in the sequence determined by the presiding officer;
- d. Each witness shall be sworn or affirmed by the presiding officer or the court reporter and shall be subject to examination and cross-examination. The presiding officer may limit questioning in a manner consistent with law; and
- e. When all parties and witnesses have been heard, parties may be given the opportunity to present final arguments.

**701—2.67(421,17A) Evidence.**

**2.67(1) Admissibility.** The presiding officer shall rule on admissibility of evidence and may, where appropriate, take official notice of facts in accordance with all applicable requirements of law.

**2.67(2) Stipulations.** Stipulation of facts is encouraged. The presiding officer may make a decision based on stipulated facts.

**2.67(3) Scope of admissible evidence.** Evidence in the proceeding shall be confined to the issues as to which the parties received notice prior to the hearing unless the parties waive their right to such notice or the presiding officer determines that good cause justifies expansion of the issues. If the presiding officer decides to admit evidence on issues outside the scope of the notice over the objection of a party who did not have actual notice of those issues, that party, upon timely request, shall receive a continuance sufficient to amend pleadings and to prepare on the additional issue.

**2.67(4) Exhibits.** The party seeking admission of an exhibit must provide opposing parties with an opportunity to examine the exhibit prior to the ruling on its admissibility. Copies of documents should normally be provided to opposing parties.

All exhibits admitted into evidence shall be appropriately marked and be made part of the record.

**2.67(5) Objection.** Any party may object to specific evidence or may request limits on the scope of any examination or cross-examination. Such an objection shall be accompanied by a brief statement of the grounds upon which it is based. The objection, the ruling on the objection, and the reasons for the ruling shall be noted in the record. The presiding officer may rule on the objection at the time it is made or may reserve a ruling until the written decision.

**2.67(6) Offer of proof.** Whenever evidence is ruled inadmissible, the party offering that evidence may submit an offer of proof on the record. The party making the offer of proof for excluded oral testimony shall briefly summarize the testimony or, with permission of the presiding officer, present the testimony. If the excluded evidence consists of a document or exhibit, it shall be marked as part of an offer of proof and inserted in the record.

**701—2.68(421,17A) Default.**

**2.68(1) Grounds.** If a party fails to appear or participate in a contested case proceeding after proper service of notice, the presiding officer may, if no adjournment is granted, enter

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a default decision or proceed with the hearing and render a decision in the absence of the party.

**2.68(2)** Moving for default. Where appropriate and not contrary to law, any party may move for default against a party who has failed to file a required pleading or has failed to appear after proper service.

**2.68(3)** Default decisions or decisions rendered on the merits after a party has failed to appear or participate in a contested case proceeding become final agency action unless, within 15 days after the date of notification or mailing of the decision, a motion to vacate is filed and served on all parties or an appeal of a decision on the merits is timely initiated within the time provided by rule 701—2.73(17A). A motion to vacate must state all facts relied upon by the moving party which establish that good cause existed for that party's failure to appear or participate at the contested case proceeding. Each fact so stated must be substantiated by at least one sworn affidavit of a person with personal knowledge of each such fact, which affidavit(s) must be attached to the motion.

**2.68(4)** The time for further appeal of a decision for which a timely motion to vacate has been filed is stayed pending a decision of the motion to vacate.

**2.68(5)** Properly substantiated and timely filed motions to vacate shall be granted only for good cause shown. The burden of proof as to good cause is on the moving party. Adverse parties shall have ten days to respond to a motion to vacate. Adverse parties shall be allowed to conduct discovery as to the issue of good cause and to present evidence on the issue prior to a decision on the motion, if a request to do so is included in that party's response.

**2.68(6)** "Good cause" for purposes of this rule shall have the same meaning as "good cause" as interpreted in the case of *Purethane, Inc. v. Iowa State Board of Tax Review*, 498 N.W.2d 706 (Iowa 1993).

**2.68(7)** A decision denying a motion to vacate is subject to further appeal within the time limit allowed for further appeal of a decision on the merits in the contested case proceeding. A decision granting a motion to vacate is subject to interlocutory appeal by the adverse party pursuant to rule 701—2.71(17A).

**2.68(8)** If a motion to vacate is granted and no timely interlocutory appeal has been taken, the presiding officer shall issue another notice of hearing and the contested case shall proceed accordingly.

**2.68(9)** A default decision may award any relief consistent with the request for relief made in the pleadings and embraced in their issues.

**2.68(10)** A default decision may provide either that the default decision is to be stayed pending a timely motion to vacate or that the default decision is to take effect immediately, subject to a request for stay under 701—2.75(17A).

**701—2.69(421,17A) Ex parte communication.**

**2.69(1)** Prohibited communications. Unless required for the disposition of ex parte matters specifically authorized by statute, following the issuance of the notice of hearing, there shall be no communication, directly or indirectly, between the presiding officer and any party or representative of any party or any other person with a direct or indirect interest in such a case in connection with any issue of fact or law in the case except upon notice and opportunity for all parties to participate. This does not prohibit persons jointly assigned such tasks from communicating with each other. Nothing in this provision is intended to preclude the presiding officer from communicating with members of the state board or seeking the advice or help of persons other than those with a personal

interest in, or those engaged in personally investigating as defined in 701—2.56(421,17A), prosecuting, or advocating in, either the case under consideration or a pending factually related case involving the same parties as long as those persons do not directly or indirectly communicate to the presiding officer any ex parte communications they have received of a type that the presiding officer would be prohibited from receiving or that furnish, augment, diminish, or modify the evidence in the record.

**2.69(2)** Prohibitions on ex parte communications commence with the issuance of the notice of hearing in a contested case and continue for as long as the case is pending.

**2.69(3)** Written, oral or other forms of communication are "ex parte" if made without notice and opportunity for all parties to participate.

**2.69(4)** To avoid prohibited ex parte communications, notice must be given in a manner reasonably calculated to give all parties a fair opportunity to participate. Notice of written communications shall be provided in compliance with rule 701—2.58(421,17A) and may be supplemented by telephone, facsimile, electronic mail or other means of notification. Where permitted, oral communications may be initiated through a telephone conference call including all parties or their representatives.

**2.69(5)** Persons who jointly act as presiding officer in a pending contested case may communicate with each other without notice or opportunity for parties to participate.

**2.69(6)** Other persons may be present in deliberations or otherwise advise the presiding officer without notice or opportunity for parties to participate as long as they are not disqualified from participating in the making of a proposed or final decision under any provision of law and they comply with subrule 2.69(2).

**2.69(7)** Communications with the presiding officer involving uncontested scheduling or procedural matters do not require notice or opportunity for parties to participate. Parties should notify other parties prior to initiating such contact with the presiding officer when feasible, and shall notify other parties when seeking to continue hearings or other deadlines pursuant to 701—2.63(421,17A).

**2.69(8)** Disclosure of prohibited communications. A presiding officer who receives a prohibited ex parte communication during the pendency of a contested case must initially determine if the effect of the communication is so prejudicial that the presiding officer should be disqualified. If the presiding officer determines that disqualification is warranted, a copy of any prohibited written communication, all written responses to the communication, a written summary stating the substance of any prohibited oral or other communication not available in written form for disclosure, all responses made, and the identity of each person from whom the presiding officer received a prohibited ex parte communication shall be submitted for inclusion in the record under seal by protective order, or disclosed if an appropriate order is made. If the presiding officer determines that disqualification is not warranted, such documents shall be submitted for inclusion in the record and served on all parties. Any party desiring to rebut the prohibited communication must be allowed the opportunity to do so upon written request filed within ten days after notice of the communication.

**2.69(9)** Promptly after being assigned to serve as presiding officer at any stage in a contested case proceeding, a presiding officer shall disclose to all parties material factual information received through ex parte communication prior to such assignment unless the factual information has already been or shortly will be disclosed pursuant to Iowa Code sec-

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tion 17A.13(2) or through discovery. Factual information contained in an investigative report or similar document need not be separately disclosed by the presiding officer as long as such documents have been or will shortly be provided to the parties.

**2.69(10)** The presiding officer may render a proposed or final decision imposing appropriate sanctions for violations of this rule including default, a decision against the offending party, censure, or suspension or revocation of the privilege to practice before the state board. Violation of ex parte communication prohibitions by state board personnel shall be reported to the Secretary for the State Board of Tax Review, Hoover State Office Building, Fourth Floor, Des Moines, Iowa 50319, for possible sanctions, including censure, suspension, dismissal, or other disciplinary action.

**701—2.70(421,17A) Recording costs.** Upon request, the state board shall provide a copy of the whole or any portion of the record at cost. The cost of preparing a copy of the record or of transcribing the hearing record shall be paid by the requesting party.

Parties who request that a hearing be recorded by certified shorthand reporters rather than by electronic means shall bear the cost of that recordation, unless otherwise provided by law.

**701—2.71(421,17A) Interlocutory appeals.** Upon written request of a party or on its own motion, the state board may review an interlocutory order of the presiding officer. In determining whether to do so, the state board shall weigh the extent to which its granting the interlocutory appeal would expedite final resolution of the case and the extent to which review of that interlocutory order by the state board at the time it reviews the proposed decision of the presiding officer would provide an adequate remedy. Any request for interlocutory review must be filed within 14 days of issuance of the challenged order, but no later than the time for compliance with the order or the date of hearing, whichever is first.

**701—2.72(421,17A) Final decision.**

**2.72(1)** When the state board presides over the reception of evidence at the hearing, its decision is a final decision.

**2.72(2)** When the state board does not preside at the reception of evidence, the presiding officer shall make a proposed decision. The proposed decision becomes the final decision of the state board without further proceedings unless there is a timely motion to vacate under rule 701—2.68(421,17A), or an appeal to, or review on motion of, the state board within the time provided in rule 701—2.73(421,17A).

**701—2.73(421,17A) Appeals and review.**

**2.73(1)** Appeal by any party. Any adversely affected party may appeal a proposed decision to the state board within 30 days after issuance of the proposed decision.

**2.73(2)** Review. The state board may initiate review of a proposed decision on its own motion at any time within 30 days following the issuance of such a decision.

**2.73(3)** Notice of appeal. An appeal of a proposed decision is initiated by filing a timely notice of appeal with the Secretary for the State Board, Hoover State Office Building, Fourth Floor, Des Moines, Iowa 50319. The notice of appeal must be signed by the appealing party or a representative of that party and contain a certificate of service. The notice shall specify:

- a. The parties initiating the appeal;
- b. The proposed decision or order appealed from;

c. The specific findings or conclusions to which exception is taken and any other exceptions to the decision or order;

d. The relief sought; and

e. The grounds for relief.

**2.73(4)** Requests to present additional evidence. A party may request the taking of additional evidence only by establishing that the evidence is material, that good cause existed for the failure to present the evidence at the hearing, and that the party has not waived the right to present the evidence. A written request to present additional evidence must be filed with the notice of appeal or, by a nonappealing party, within 14 days of service of the notice of appeal. The state board may remand a case to the presiding officer for further hearing or may itself preside at the taking of additional evidence.

**2.73(5)** Scheduling. The state board shall issue a schedule for consideration of the appeal.

**2.73(6)** Briefs and arguments. Unless otherwise ordered, within 20 days of the notice of appeal or order for review, each appealing party may file exceptions and briefs. Within 20 days thereafter, any party may file a responsive brief. Briefs shall cite any applicable legal authority and specify relevant portions of the record in that proceeding. Written requests to present oral argument shall be filed with the briefs.

The state board may resolve the appeal on the briefs or provide an opportunity for oral argument. The state board may shorten or extend the briefing period as appropriate.

**701—2.74(421,17A) Applications for rehearing.**

**2.74(1)** By whom filed. Any party to a contested case proceeding may file an application for rehearing from a final order.

**2.74(2)** Content of application. The application for rehearing shall state on whose behalf it is filed, the specific grounds for rehearing, and the relief sought. In addition, the application shall state whether the applicant desires reconsideration of all or part of the decision on the existing record and whether, on the basis of the grounds enumerated in subrule 2.73(4), the applicant requests an opportunity to submit additional evidence.

**2.74(3)** Time of filing. The application shall be filed with the state board within 20 days after issuance of the final decision.

**2.74(4)** Notice to other parties. A copy of the application shall be timely mailed by the applicant to all parties of record not joining therein. If the application does not contain a certificate of service, the state board shall serve copies on all parties.

**2.74(5)** Disposition. Any application for a rehearing shall be deemed denied unless the agency grants the application within 20 days after its filing.

**701—2.75(421,17A) Stays of agency actions.**

**2.75(1)** When available.

a. Any party to a contested case proceeding may petition the state board for a stay of an order issued in that proceeding or for other temporary remedies, pending review by the state board. The petition shall be filed with the notice of appeal and shall state the reasons justifying a stay or other temporary remedy. The state board may rule on the stay or authorize the presiding officer to do so.

b. Any party to a contested case proceeding may petition the state board for a stay or other temporary remedies pending judicial review, of all or part of that proceeding. The petition for a stay shall state the reasons justifying a stay or other temporary remedy.

## REVENUE AND FINANCE DEPARTMENT[701](cont'd)

**2.75(2)** When granted. In determining whether to grant a stay, the presiding officer or state board shall consider the factors listed in 1998 Iowa Acts, chapter 1202, section 23(5c).

**2.75(3)** Vacation. A stay may be vacated by the state board upon application of the department or any other party.

**701—2.76(421,17A) No factual dispute contested case.** If the parties agree that no dispute of material fact exists as to a matter that would be a contested case if such a dispute of fact existed, the parties may present all relevant admissible evidence either by stipulation or otherwise as agreed by the parties, without necessity for the production of evidence at an evidentiary hearing. If such agreement is reached, a jointly submitted schedule detailing the method and timetable for submission of the record, briefs, and oral argument should be submitted to the presiding officer for approval as soon as practicable. If the parties cannot agree, any party may file and serve a motion for summary judgment pursuant to the rules governing such motions.

These rules are intended to implement Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202.

**ARC 8786A****REVENUE AND FINANCE  
DEPARTMENT[701]****Notice of Intended Action**

Twenty-five interested persons, a governmental subdivision, an agency or association of 25 or more persons may demand an oral presentation hereon as provided in Iowa Code section 17A.4(1)"b."

Notice is also given to the public that the Administrative Rules Review Committee may, on its own motion or on written request by any individual or group, review this proposed action under section 17A.8(6) at a regular or special meeting where the public or interested persons may be heard.

Pursuant to the authority of Iowa Code sections 421.17 and 17A.3, the Department of Revenue and Finance hereby gives Notice of Intended Action to amend Chapter 7, "Practice and Procedure Before the Department of Revenue and Finance," and Chapter 10, "Interest, Penalty, Exceptions to Penalty, and Jeopardy Assessments," Iowa Administrative Code.

Rules governing informal, formal, administrative, and judicial review and other Department proceedings commenced before July 1, 1999, are placed in a new Division I of Chapter 7.

New rules 7.36(421,17A) to 7.59(17) are set forth under a new Division II of Chapter 7 to govern informal, formal, administrative, and judicial review procedures applicable to contested cases and other proceedings commenced on or after July 1, 1999, in order to implement 1998 Iowa Acts, chapter 1202.

The summary of the Department's new rules is as follows:

**701—7.36(421,17A)** Applicability and scope of the rules. This rule provides the parameters of the rules, sets forth the text of the current 701—7.2(17A), and adds replacement taxes, statewide property tax and set-off procedures to the list of the scope of rules.

**701—7.37(421,17A)** Definitions. This rule sets forth the text of the current 701—7.1(17A), amends current definitions and adds several definitions for the purpose of clarification and to incorporate 1998 Iowa Acts, chapter 1202, including, but not limited to, "Presiding officer," "Affiliate or subsidiary of and entity dominant in its field of operation," "Declaratory order," "Division of administrative hearings,"

"Dominant in its field of operation," "Intervene," "Is-suance," "Proposed decision," "Provision of law," "Rule," and "Small business."

**701—7.38(421,17A)** Applicability of rules set forth in Division I of 701—Chapter 7. This rule incorporates by reference from Division I rules that are not in need of amendment to comply with 1998 Iowa Acts, chapter 1202, applicable to proceedings commenced on or after July 1, 1999.

**701—7.39(17A)** Business hours. This rule adopts the current rule 701—7.3(17A) and incorporates the language and procedures of 1998 Iowa Acts, chapter 1202.

**701—7.40(17A)** Persons authorized to represent themselves or others. This rule adopts current rule 701—7.6(17A) and incorporates the language and procedures of 1998 Iowa Acts, chapter 1202.

**701—7.41(17A)** Protest. This rule adopts current rule 701—7.8(17A) and incorporates the language and procedures of 1998 Iowa Acts, chapter 1202. This rule also provides that all filings be made to the clerk of the hearings section for the Department. If a filing is a protest, then the file will be transferred to the administrative hearings section, if not retained by the Director, within 30 days of the filing of an answer to the protest or demand for the contested case. This rule also provides for the denial of a renewal of a vehicle registration or denial of issuance or renewal, or suspension of a driver's license.

**701—7.42(17A)** Identifying details. This rule adopts current 701—7.9(17A) and incorporates the language and procedures of 1998 Iowa Acts, chapter 1202.

**701—7.43(17A)** Docket. This rule adopts current rule 701—7.10(17A) and incorporates the language and procedures of 1998 Iowa Acts, chapter 1202.

**701—7.44(17A)** Informal procedures and dismissals of protests. This rule adopts current rule 701—7.11(17A) and incorporates the language and procedures of 1998 Iowa Acts, chapter 1202.

**701—7.45(17A)** Answer. This rule adopts current rule 701—7.12(17A) and incorporates the language and procedures of 1998 Iowa Acts, chapter 1202. In addition, this rule provides that the Department's answer to a protest may contain a statement setting forth whether the case at issue should be transferred to the division of administrative hearings. If the Department's answer is silent on this issue, then the case will be automatically transferred to the division of administrative hearings, unless the Director, by the Director's own motion, decides to retain the case.

**701—7.46(17A)** Subpoenas. This rule adopts current rule 701—7.13(17A) and incorporates the language and procedures of 1998 Iowa Acts, chapter 1202.

**701—7.47(17A)** Commencement of contested case proceedings. This rule adopts current rule 701—7.14(17A) and incorporates the language and procedures of 1998 Iowa Acts, chapter 1202. However, the portion of 701—7.14(17A) regarding bonding has not been adopted since these provisions are no longer applicable to contested cases.

**701—7.48(17A)** Discovery. This rule adopts current rule 701—7.15(17A) and incorporates the language and procedures of 1998 Iowa Acts, chapter 1202.

**701—7.49(17A)** Prehearing conference. This rule adopts current rule 701—7.16(17A) and incorporates the language and procedures of 1998 Iowa Acts, chapter 1202.

**701—7.50(17A)** Contested case proceedings. This rule adopts current rule 701—7.17(17A) and incorporates the language and procedures of 1998 Iowa Acts, chapter 1202. This rule includes a new subrule which sets forth the process to be followed to determine when a protest is retained by the

## REVENUE AND FINANCE DEPARTMENT[701](cont'd)

Director for hearing or when the case is transferred to the division of administrative hearings. It also contains procedures for objecting to a determination by the Director to retain a case. This rule also provides that the Director has the right to require that any presiding officer possess certain criteria in order to preside over Department cases. In addition, this rule includes a new subrule specifically for default judgments which follows much of the text of the Uniform Rules for contested cases set forth in X.21(17A). Some of the text from Uniform Rules governing contested cases set forth in X.24, regarding interlocutory appeals is also included in this rule. This rule also includes a new subrule regarding stays and sets forth the text of Uniform Rules for contested cases X.9(17A) regarding consolidation and severance of cases.

701—7.51(17A) Record and transcript. This rule adopts current rule 701—7.19(17A) and incorporates the language and procedures of 1998 Iowa Acts, chapter 1202.

701—7.52(17A) Rehearing. This rule adopts current rule 701—7.20(17A) and incorporates the language and procedures of 1998 Iowa Acts, chapter 1202.

701—7.53(17A) Service. This rule adopts current rule 701—7.21(17A) and incorporates the language and procedures of 1998 Iowa Acts, chapter 1202.

701—7.54(17A) Ex parte communications and disqualification. This rule adopts current rule 701—7.23(17A) and incorporates the language and procedures of 1998 Iowa Acts, chapter 1202, as well as many of the provisions set forth in the Uniform Rules governing contested cases in X.22(17A). This rule also provides what constitutes disqualification of a presiding officer and includes many of the provisions set forth in the Uniform Rules governing contested cases in X.8(17A).

701—7.55(17A) Licenses. This rule adopts current rule 701—7.24(17A) and incorporates the language and procedures of 1998 Iowa Acts, chapter 1202.

701—7.56(17A) Declaratory order—in general. This rule adopts current rule 701—7.25(17A) and incorporates the language and procedures of 1998 Iowa Acts, chapter 1202, and also adopts the majority of its language from the Uniform Rules governing Declaratory orders: X.1(17A) Petition, X.2(17A) Notice of petition, X.3(17A) Intervention, X.4(17A) Briefs, X.5(17A) Inquiries, X.6(17A) Service and filing, X.7(17A) Consideration, X.8(17A) Action on petition, X.9(17A) Refusal to issue order, X.10 Contents, X.11(17A) Copies, and X.12(17A) Effect of declaratory order. In addition, this rule also requires that an intervenor consent to be bound by the declaratory order as part of the petition for intervention.

701—7.57(17A) Department procedure for rule making. This rule adopts the Uniform Rules governing rule making set forth in: X.2(17A) Advice on possible rules before notice of proposed rule adoption, X.4(1) Notice of proposed rule making—Contents, X.4(3) Notice of proposed rule making—Copies of notices, X.5 Public participation, X.6(17A) Regulatory analysis, X.7(17A) Fiscal impact statements, X.8(17A) Time and manner of rule adoption, X.9(17A) Variance between adopted rule and published notice of proposed rule adoption, X.10 Exemptions from public rule-making procedures with the exemption generally limited to nonsubstantive rule changes, X.11(17A) Concise statement of reasons, X.12(1) Contents, style and form of rule—Contents, X.12(4) Contents, style and form—Style and form, X.14(17A) Filing of rules, X.15(17A) Effectiveness of rules prior to publication, X.16(17A) General statement of policy, and X.17(17A) Review by agency of rules.

The Department also specifically sets forth the Uniform Rules that are not adopted by the Department. These provi-

sions are as follows: X.1(17A) Applicability, X.3(17A) Public rule-making docket, X.4(2) Notice of proposed rule making—incorporated by reference, X.12(2) Contents, style, and form of rule—incorporation by reference, X.12(3) Contents, style and form of rule—References to materials not published in full, and X.13(17A) Agency rule-making record.

701—7.58(17A) Public inquiries on rule making. This rule sets forth the Department's rule-making records and provides the location at which the public may inquire regarding the status of a rule.

701—7.59(17A) Criticism of rules. This rule provides a location at which interested persons may submit criticisms, waivers or comments regarding a rule. This rule provides the criteria for a "criticism" and the retention period of such.

Item 3 amends the Department's procedures for posting bonds. Rules 701—10.117(422,453B) through 701—10.123(422,453B) and 701—10.126(422,453B) are amended to incorporate the language and procedures of 1998 Iowa Acts, chapter 1202.

The proposed amendments will not necessitate additional expenditures by political subdivisions or agencies and entities which contract with political subdivisions.

The Department has determined that these proposed amendments may have an impact on small business. The Department has considered the factors listed in Iowa Code section 17A.31(4). The Department will issue a regulatory flexibility analysis as provided in Iowa Code sections 17A.31 to 17A.33 if a written request is filed by delivery or by mailing postmarked no later than April 13, 1999, to the Policy Section, Compliance Division, Department of Revenue and Finance, Hoover State Office Building, P.O. Box 10457, Des Moines, Iowa 50306. The request may be made by the Administrative Rules Review Committee, the Governor, a political subdivision, at least 25 persons who qualify as a small business under Iowa Code sections 17A.31 to 17A.33, or an organization of small businesses representing at least 25 persons which is registered with this department under Iowa Code sections 17A.31 to 17A.33.

Any interested person may make written suggestions or comments on these proposed amendments on or before April 23, 1999. Such written comments should be directed to the Policy Section, Compliance Division, Department of Revenue and Finance, Hoover State Office Building, P.O. Box 10457, Des Moines, Iowa 50306.

Persons who want to orally convey their views should contact the Policy Section, Compliance Division, Department of Revenue and Finance, at (515)281-4250 or at the Department of Revenue and Finance offices on the fourth floor of the Hoover State Office Building.

Requests for a public hearing must be received by April 16, 1999.

These amendments are intended to implement 1998 Iowa Acts, chapter 1202.

The following amendments are proposed.

ITEM 1. Amend 701—Chapter 7 by creating a new division heading for rules 701—7.1(421,17A) through 701—7.35(421,17A) as follows:

## DIVISION I

INFORMAL, FORMAL, ADMINISTRATIVE AND JUDICIAL REVIEW PROCEDURES APPLICABLE TO CONTESTED CASES AND OTHER PROCEEDINGS COMMENCED PRIOR TO JULY 1, 1999

ITEM 2. Amend 701—Chapter 7 by creating a new Division II as follows:

## REVENUE AND FINANCE DEPARTMENT[701](cont'd)

## DIVISION II

INFORMAL, FORMAL, ADMINISTRATIVE AND JUDICIAL REVIEW  
PROCEDURES APPLICABLE TO CONTESTED CASES AND OTHER  
PROCEEDINGS COMMENCED ON OR AFTER JULY 1, 1999

**701—7.36(421,17A) Applicability and scope of rules.** Effective July 1, 1999, the rules contained in this division pertain to practice and procedure and are designed to implement the requirements of the Act, and aid in the effective and efficient administration and enforcement of the tax laws of this state and other activities of the department. These rules shall govern the practice, procedure and conduct of the informal proceedings, contested case proceedings, licensing, rule making, and declaratory orders involving taxation and other areas within the department's jurisdiction which includes the following:

1. Sales tax—Iowa Code sections 422.42 to 422.59;
2. Use tax—Iowa Code chapter 423;
3. Individual and fiduciary income tax—Iowa Code sections 422.4 to 422.31 and 422.110 to 422.112;
4. Franchise tax—Iowa Code sections 422.60 to 422.66;
5. Corporate income tax—Iowa Code sections 422.32 to 422.41 and 422.110 to 422.112;
6. Withholding tax—Iowa Code sections 422.16 and 422.17;
7. Estimated tax—Iowa Code sections 422.16, 422.17 and 422.85 to 422.92;
8. Motor fuel tax—Iowa Code chapter 452A;
9. Property tax—Iowa Code chapters 421, 425, 426A, 427, 427A, 428, 428A and 433 to 441;
10. Cigarette and tobacco tax—Iowa Code chapters 421B and 453A;
11. Inheritance, generation skipping transfer, and estate tax—Iowa Code chapters 450, 450A, 450B and 451;
12. Local option taxes—Iowa Code chapter 422B;
13. Hotel and motel tax—Iowa Code chapter 422A;
14. Drug excise tax—Iowa Code chapter 453B;
15. Automobile rental excise tax—Iowa Code chapter 422C;
16. Environmental protection charge—Iowa Code chapter 424;
17. Replacement taxes—Iowa Code chapter 437A;
18. Statewide property tax—Iowa Code chapter 437A;
19. Set-off procedures—Iowa Code section 421.17(29);
20. Other taxes and activities as may be assigned to the department from time to time; and
21. The Taxpayer's Bill of Rights—Iowa Code section 421.60.

As the purpose of these rules is to facilitate business and advance justice, any rule contained herein, pursuant to statutory authority, may be suspended or waived by the department to prevent undue hardship in any particular instance or to prevent surprise or injustice.

This rule is intended to implement Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202.

**701—7.37(421,17A) Definitions.** These definitions apply to the rules contained in Division II, unless the text otherwise states to the contrary:

"Act" means the Iowa administrative procedures Act.

"Affiliate or subsidiary of an entity dominant in its field of operation" means an entity which is at least 20% owned by an entity that is dominant in its field of operation, or by a partner, officer, director, majority stockholder or their equivalent, of an entity dominant in that field of operation.

"Agency" means each board, commission, department, officer, or other administrative office or unit of the state.

"Contested case" means a proceeding, including licensing, in which the legal rights, duties or privileges of a party are required by constitution or statute to be determined by an agency after an opportunity for an evidentiary hearing. This term also includes any matter defined as a no factual dispute contested case under 1998 Iowa Acts, chapter 1202, section 14.

"Declaratory order" is an order issued pursuant to 1998 Iowa Acts, chapter 1202, section 13.

"Department" means the Iowa department of revenue and finance.

"Department of inspections and appeals" means the state department created by Iowa Code chapter 10A.

"Director" means the director of the department or the director's authorized representative.

"Division of administrative hearings" means the division of the department of inspections and appeals responsible for holding contested case proceedings pursuant to Iowa Code chapter 10A.

"Dominant in its field of operation" means having more than 20 full-time equivalent positions and more than \$1 million in annual gross revenues.

"Intervene" means to file a petition with the department requesting that the petitioner be allowed to intervene in the processing of a declaratory order currently under the department's consideration.

"Issuance" means the date of mailing of a decision or order or date of delivery if service is by other means unless another date is specified in the order.

"License" means the whole or a part of any permit, certificate, approval, registration, charter, or similar form of permission required by statute.

"Licensing" means the department process respecting the grant, denial, renewal, revocation, suspension, annulment, withdrawal, or amendment of a license.

"Motion" has the same meaning as the term is defined in rule 100 of the Iowa Rules of Civil Procedure.

"Party" means each person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, including intervenors.

"Person" means any individual; estate; trust; fiduciary; partnership, including limited liability partnership; corporation, including limited liability corporation; association; governmental subdivision; or public or private organization of any character or any other person covered by the Act other than an agency.

"Petition" means application for declaratory order, request to intervene in a declaratory order under consideration, application for initiation of proceedings to adopt, amend or repeal a rule or document filed in licensing.

"Pleadings" means protest, answer, reply or other similar document filed in a contested case proceeding, including contested cases involving no factual dispute.

"Presiding officer" means the person designated to preside over a proceeding involving the department. A presiding officer of a contested case involving the department will be either the director or a qualified administrative law judge appointed, pursuant to Iowa Code chapter 17A, by the division of administrative hearings established pursuant to 1998 Iowa Acts, chapter 1202, section 3. In cases in which the department is not a party, at the director's discretion, the presiding officer may be the director or the director's designee. A presiding officer of an administrative appeal is the director of the department.

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“Proceeding” means informal, formal and contested case proceedings.

“Proposed decision” means the presiding officer’s recommended findings of fact, conclusions of law, decision, and order in a contested case in which the director did not preside.

“Protester” means any person entitled to file a protest which can culminate in a contested case proceeding.

“Provision of law” means the whole or part of the Constitution of the United States of America or the Constitution of the State of Iowa, or of any federal or state statute, court rule, executive order of the governor, or rule of the department.

“Review unit” means the unit composed of department employees designated by the director and the attorney general’s staff who have been assigned by the director to review protests filed by taxpayers.

“Rule” means a statement by the department of general applicability that implements, interprets, or prescribes law or policy, or that describes the organization, procedure, or practice requirements of the department. Notwithstanding any other statute, the term includes an executive order or directive of the governor which creates an agency or establishes a program or which transfers a program between agencies established by statute or rule. The term includes the amendment or repeal of an existing rule, but does not include the excluded items set forth in Iowa Code section 17A.2(10).

“Small business” means any entity including, but not limited to, an individual, partnership, corporation, joint venture, association, or cooperative. A “small business” is not an affiliate of an entity dominant in its field or operation. A small business has either 20 or fewer full-time equivalent positions or less than \$1 million in annual gross revenues in the preceding fiscal year.

Unless otherwise specifically stated, the terms used in these rules promulgated by the department shall have the meanings defined by the Act.

This rule is intended to implement Iowa Code section 10A.202(1)“m,” Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202, and Iowa Code section 421.14.

**701—7.38(421,17A) Applicability of rules set forth in Division I of Chapter 7.** Many of the rules governing informal, administrative and judicial review proceedings were not required to be changed by 1998 Iowa Acts, chapter 1202. Accordingly the following rules are incorporated by reference into this division and will govern their respective topics in relation to proceedings under this division:

701—7.4(17A) Computation of time, filing of documents;

701—7.5(17A) Form and style of papers;

701—7.7(17A) Resolution of tax liability;

701—7.18(17A) Interventions;

701—7.27(9C,91C) Procedure for nonlocal business entity bond forfeitures;

701—7.30(421) Definitions which apply to rule 701—7.31(421) to 701—7.35(421);

701—7.31(421) Abatement of unpaid tax;

701—7.32(421) Time and place of taxpayer interviews;

701—7.33(421) Mailing to the last known address;

701—7.34(421) Power of attorney; and

701—7.35(421) Taxpayer designation of tax type and period to which voluntary payments are to be applied.

**701—7.39(17A) Business hours.** The principal office of the department in the Hoover State Office Building in Des Moines, Iowa, shall be open between the hours of 8 a.m. and 4:30 p.m. each weekday except Saturdays, Sundays and legal

holidays as prescribed in Iowa Code section 4.1(34), for the purpose of receiving protests, pleadings, petitions, motions, requests for public information, copies of official documents, or for the opportunity to inspect public records.

All documents or papers required to be filed with the department by these rules shall be filed with the designated clerk of the hearings section in the principal office of the department in the Hoover State Office Building, Des Moines, Iowa 50319. Requests for public information or copies of official documents or the opportunity to inspect public records shall be made in the director’s office at the department’s principal office.

**701—7.40(17A) Persons authorized to represent themselves or others.** Due to the complex questions involved and the technical aspects of taxation, persons are encouraged to seek the aid, advice, assistance and counsel of practicing attorneys and certified public accountants.

The right to represent one’s self or others in connection with any proceeding before the department or administrative hearings division shall be limited to the following classes of persons:

1. Taxpayers who are natural persons representing themselves;

2. Attorneys duly qualified and entitled to practice in the courts of the state of Iowa;

3. Attorneys who are entitled to practice before the highest court of record of any other state and who have complied with Court Rule 113 of the Iowa Bar Rules of the Iowa Supreme Court;

4. Accountants who are authorized, permitted, or licensed under Iowa Code chapter 542C;

5. Duly authorized directors or officers of corporations representing the corporation of which they are respectively a director or officer, excluding attorneys who are acting in the capacity of a director or officer of a corporation and who have not met the requirements of the third classification above;

6. Partners representing their partnership;

7. Fiduciaries;

8. Government officials authorized by law; or

9. Enrolled agents, currently enrolled under 31 CFR §10.6 for practice before the Internal Revenue Service, representing a taxpayer in proceedings under division II of Iowa Code chapter 422.

No person who has served as an official or employee of the department shall within a period of two years after the termination of such service or employment appear before the department or receive compensation for any services rendered on behalf of any person, firm, corporation, or association in relation to any case, proceeding, or application with respect to which the person was directly concerned and in which the person personally participated during the period of service or employment.

Any person appearing in any proceeding involving the department, regardless of whether the department is a party, must have on file with the department a valid Iowa power of attorney.

This rule is intended to implement Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202.

**701—7.41(17A) Protest.** Any person wishing to contest an assessment, denial of refund claim, or any other department action, except licensing, which may culminate in a contested case proceeding shall file a protest, in writing, with the department within the time prescribed by the applicable statute or rule for filing notice of application to the director for a hearing. The protest must be either delivered to the depart-

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ment by electronic means, United States Postal Service or a common carrier by ordinary, certified, or registered mail directed to the attention of the clerk of the hearings section for the department, personally delivered to the clerk of the hearings section for the department, or be served on the clerk of the hearings section for the department by personal service during business hours. For the purpose of mailing, a protest is considered filed on the date of the postmark. If a postmark date is not present on the mailed article, then the date of receipt of protest will be considered the date of mailing. Any document, including a protest, is considered filed the date personal service or personal delivery to the office of the clerk of the hearings section for the department is made. See Iowa Code section 622.105 for the evidence necessary to establish proof of mailing.

The period for appealing department action relating to refund claims is the same statutory period for contesting an assessment. Failure to timely file a written protest will be construed as a waiver of opposition to the matter involved unless, on the director's own motion, pursuant to statutory authority, the powers of abatement or settlement are exercised. The review unit, created within the department by the director to review protests as provided in 701—7.44(17A), may seek dismissal of protests which are not in the proper form as provided by this rule. See subrule 7.44(2) for dismissals.

If the department has not granted or denied a filed refund claim within six months of filing the claim, the refund claimant may file a protest. Even though a protest is so filed, the department is entitled to examine and inspect the refund claimant's records to verify the refund claim.

Notwithstanding the above, the taxpayer who fails to timely protest an assessment may contest the assessment by paying the whole assessed tax, interest, and penalty and by filing a refund claim within the time period provided by law for filing such claim. However, in the event that such assessment involves divisible taxes, which are not timely protested, namely, an assessment which is divisible into a tax on each transaction or event, the taxpayer can contest the assessment by paying a portion of the assessment and filing a refund claim within the time period provided by law. In this latter instance, the portion paid must represent any undisputed portion of the assessment and must also represent the liability on a transaction or event for which, if the taxpayer is successful in contesting the portion paid, the unpaid portion of the assessment would be canceled. *Flora v. United States*, 362 U.S. 145, 4 L.Ed. 2d 623, 80 S.Ct. 630 (1960); *Higginbotham v. United States*, 556 F.2d 1173 (4th Cir. 1977); *Steele v. United States*, 280 F.2d 89 (8th Cir. 1960); *Stern v. United States*, 563 F.Supp. 484 (D. Nev. 1983); *Drake v. United States*, 355 F. Supp. 710 (E.D. Mo. 1973). Any such protest filed is limited to the issues covered by the amounts paid for which a refund was requested and denied by the department. Thereafter, if the department does not grant or deny the refund within six months of the filing of the refund claim or if the department denies the refund, the taxpayer may file a protest as authorized by this rule.

All of the taxes administered and collected by the department can be divisible taxes, except individual income tax, fiduciary income tax, corporation income tax, franchise tax, and statewide property tax. The following noninclusive examples illustrate the application of the divisible tax concept.

**EXAMPLE A.** X is assessed withholding income taxes, penalty and interest, as a responsible party on eight employees. X fails to timely protest the assessment. X contends that X is not a responsible party. If X is a responsible party, X

was required to make monthly deposits of the withholding taxes. In this situation, the withholding taxes are divisible. Therefore, X can pay an amount of tax, penalty and interest attributable to one employee for one month and file a refund claim within the time period provided by law since if X is successful on the refund claim the remaining unpaid portion of the assessment would be canceled.

**EXAMPLE B.** Y is assessed sales tax, interest, and penalty for electricity purchased and used to power a piece of machinery in Y's manufacturing plant. Y fails to timely protest the assessment. Y was billed monthly for electricity by the power company to whom Y had given an exemption certificate. Y contends that the particular piece of machinery is used directly in processing tangible personal property for sale and that, therefore, all of the electricity is exempt from sales tax. In this situation, the sales tax is divisible. Therefore, Y can pay an amount of tax, penalty and interest attributable to one month's electrical usage in that machinery and file a refund claim within the time period provided by law since if Y is successful on the refund claim the remaining unpaid portion of the assessment would be canceled.

The protest shall be brought by and in the name of the interested or affected person or by and in the full descriptive name of the fiduciary legally entitled to institute a proceeding on behalf of the person or by an intervenor in contested case proceedings. In the event of a variance in the name set forth in the protest and the correct name, a statement of the reason for the discrepancy shall be set forth in the protest. A protest which is filed shall contain:

**7.41(1)** A caption in the following form:

BEFORE THE DEPARTMENT OF REVENUE AND FINANCE	
HOOVER STATE OFFICE BUILDING	
DES MOINES, IOWA	
IN THE MATTER OF _____ (state taxpayer's name and address and designate type of proceeding, e.g., income tax refund claim).	} PROTEST DOCKET NO. _____ (filled in by Department)

**7.41(2)** Substantially state in separate numbered paragraphs the following:

- a. Proper allegations showing:
  - (1) Date of assessment;
  - (2) Date of refund denial;
  - (3) Whether the protester failed to timely appeal the assessment and, if so, the date of payment and the date of filing the refund claim;
  - (4) Whether the protest involves the appeal of a refund claim after six months from the date of filing the refund claim because the department failed to deny the claim;
  - (5) Attach a copy of the assessment, refund claim, and refund denial;
  - (6) Other items that the protester wishes to bring to the attention of the department; and
  - (7) Request for attorney fees, if applicable.
- b. The type of tax, the taxable period or periods involved and the amount in controversy;
- c. Each error alleged to have been committed, listed in a separate paragraph. For each error listed, provide an explanation of the error and all relevant facts related to the error;
- d. Reference to any particular statute or statutes and any rule or rules involved, if known;

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e. Description of records or documents which were not available or were not presented to department personnel prior to the filing of the protest, if any, and provide copies of any records or documents that were not previously presented to the department;

f. Any other matters deemed relevant and not covered in the above paragraphs;

g. The desire of protester to waive informal or contested case proceedings if it is desired; unless the protester so indicates a waiver, informal procedures will be initiated;

h. A statement setting forth the relief sought by the protester;

i. The signature of the protester or that of the protester's representative, the addresses of the protester and of the protester's representative, and the telephone number of the protester or the protester's representative; and

j. Attach a copy of power of attorney for protester's representative.

Upon receipt of the protest, the clerk of the hearings section for the department shall register the receipt of the protest, docket the protest, and shall assign a number to the case. The assigned number shall be placed on all subsequent pleadings filed in the case. An original and two copies of the protest shall be filed with the clerk of the hearings section of the department.

The protester may amend the protest at any time prior to the commencement of the evidentiary hearing. The department can request that protester amend the protest for purposes of clarification.

Upon the filing of an answer or if a demand for contested case is made by the protester, the clerk of the hearings section of the department will transfer the protest file to the division of administrative hearings established by 1998 Iowa Acts, chapter 1202, section 3, within 30 days of the date of the filing of the answer or the demand for contested case, unless the director determines not to transfer the case. If a party objects to a determination under 701—7.50(17A), the transfer, if any, would be made after the director makes a ruling on the objection.

**7.41(3) Denial of renewal of vehicle registration or denial of issuance or renewal, or suspension, of a driver's license.** A person who has had an application for renewal of vehicle registration denied or has been denied the issuance of a driver's license or the renewal of a driver's license, or has had a driver's license suspended may file a protest with the clerk of the hearings section for the department if the denial of the issuance or renewal or the suspension is because the person owes delinquent taxes.

The issues raised in a protest by the person, which are limited to a mistake of fact, may include but are not limited to:

1. The person has the same name as the obligor but is not the correct person;
2. The amount in question has been paid; or
3. The person has made arrangements with the department to pay the amount.

**701—7.42(17A) Identifying details.** Any person may at any time file a motion to delete identifying details concerning the person from any document relating to any proceedings as defined in rule 701—7.37(17A) prior to disclosure to members of the public. Such a motion must be filed with the clerk of the hearings section for the department if the motion is filed prior to the commencement of a contested case, which is before the Notice for Hearing is issued. If the motion is filed during a contested case, but prior to an interagency appeal, then the motion must be filed with the presiding officer. If such a motion is filed during or after an interagency appeal

has been filed, then the motion must be filed with the office of the clerk of the hearings section for the department.

If the motion concerns information which is not a part of a contested case, the motion shall be in the form of a request to delete identifying details; if part of a contested case, the motion shall be in the form of a motion to delete identifying details. All motions to delete shall conform to subrule 7.50(4). The motion or request shall contain the following:

1. The name of the person requesting deletion and the docket number of the proceeding, if applicable;

2. The legal basis for the request for deletion; such as, release of the material would be a clearly unwarranted invasion of personal privacy or the material is a trade secret or of advantage to competitors. A corporation may not claim an unwarranted invasion of privacy;

3. A precise description of the document, report, or other material in the possession of the department from which the deletion is sought, and a precise description of the information to be deleted. If deletion is sought from more than one document, each document and the materials sought to be deleted from it shall be listed in separate paragraphs. Also contained in each separate paragraph shall be a statement of the legal basis for the deletion requested in that paragraph, such as, the material sought to be deleted is a trade secret or its release would give advantage to competitors and serve no public purpose;

4. An affidavit in support of deletion must accompany each motion or request. The affidavit must be sworn to by a person familiar with the facts asserted within it and shall contain a clear and concise explanation of the facts justifying deletion, not merely the legal basis for deletion; and

5. All affidavits shall contain a general and truthful statement that the information sought to be deleted is not available to the public from any source or combination of sources, direct or indirect, and whether the grounds for deletion is that the release of information would give advantage to competitors, and a general statement that the release would serve no public purpose.

**701—7.43(17A) Docket.** The clerk of the hearings section for the department shall maintain a docket of all proceedings and each of the proceedings shall be assigned a number. Every matter coming within the purview of these rules shall be assigned a docket number which shall be the official number for the purposes of identification. Upon receipt of a protest, petition for declaratory order or petition to initiate rule-making proceedings, the proceeding will be docketed and assigned a number, and the parties notified thereof. The number shall be placed by the parties on all papers thereafter filed in the proceeding.

**701—7.44(17A) Informal procedures and dismissals of protests.**

**7.44(1) Informal procedures.** Persons are encouraged to utilize the informal procedures provided herein so that a settlement may be reached between the parties without the necessity of initiating contested case proceedings. Therefore, unless the protester indicates a desire to waive the informal procedures in the protest or the department waives informal procedures upon notification to the protester, such informal procedures will be initiated as herein provided upon the filing of a proper protest.

- a. Review unit. A review unit is created within the department and, subject to the control of the director, the unit will:

- (1) Review and evaluate the validity of all protests made by taxpayers from the department action.

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(2) Determine the correct amount of tax owing or refund due.

(3) Determine the best method of resolving the dispute between the protester and the department.

(4) Assign protests to the appropriate divisions or sections of the department for resolution.

(5) Take further action regarding the protest, including any additions and deletions to the audit, as may be warranted by the circumstances to resolve the protest, including a request for an informal conference.

(6) Determine whether the protest complies with rule 701—7.41(17A) and request any amendments to the protest or additional information.

After assignment of the protest, the section or division responsible may concede any items contained in the protest which it determines should not be controverted by the department. If the protester has not waived informal procedures, the section or division responsible may request the protester and the protester's representative, if any, to attend an informal conference with the responsible section or division to explore the possibility of reaching a settlement without the necessity of initiating contested case proceedings or of narrowing the issues presented in the protest if no settlement can be made.

Findings dealing with the issues raised in the protest may be issued unless the issues may be more expeditiously determined in another manner or it is determined that findings are unnecessary. The protester will be notified of the decision on the issues in controversy.

Nothing herein will prevent the section or division responsible and the protester from mutually agreeing on the manner in which the protest will be informally reviewed.

b. Settlements. If a settlement is reached during informal procedures, the clerk of the hearings section must be notified. An order shall be issued and served upon all parties, stating that a settlement was reached by the parties and that the case is terminated.

#### 7.44(2) Dismissal of protests.

a. Whether informal procedures have been waived or not, the failure of the protester to timely file a protest or to pursue the protest may be grounds for dismissal of the protest by the director or the director's designee. If the protest is so dismissed, the protester may file an application for reinstatement of the protest for good cause as provided in paragraph "c" of this subrule. Such application must be filed within 30 days of the date of the dismissal notice. Thereafter, the procedure in paragraph "c" of the subrule should be followed. If informal procedures have not been waived, the failure of the protester to present evidence or information requested by the review unit shall constitute grounds for the director or the director's designee to dismiss the protest. For purposes of this subrule, an evasive or incomplete response will be treated as a failure to present evidence or information. The failure of protester to file a protest in the format required by rule 7.41(17A) may be grounds for dismissal of the protest by the director or the director's designee.

b. If the department seeks to have the protest dismissed, the review unit shall file a motion to dismiss with the clerk of the hearings section for the department and serve a copy of the motion on the protester. Protester may file a resistance to the motion within 20 days of the date of service of the motion. If no resistance is so filed, the director or the director's designee shall immediately enter an order dismissing the protest. If a resistance is filed, the review unit has ten days from the date of the filing of the resistance to decide whether to withdraw its motion and so notify the clerk of the hearings

section for the department and protester. If no such notice is issued by the review unit within the ten-day period, the protest file will be transferred to the division of administrative hearings, which shall issue a notice for a contested case proceeding on the motion as prescribed by rule 7.47(17A), except that the issue of the contested case proceeding shall be limited to the question of whether the protest shall be dismissed. Thereafter, the rules of the department pertaining to contested case proceedings shall apply in such dismissal proceedings.

c. If a motion to dismiss is filed and is unresisted, a protest so dismissed may be reinstated by the director or the director's designee for good cause as interpreted by the Iowa Supreme Court in the case of *Purethane, Inc. v. Iowa State Board of Tax Review*, 498 N.W.2d 706 (Iowa 1993) if an application for reinstatement is filed with the clerk of the hearings section for the department within 30 days of the date the protest was dismissed. The application shall set forth all reasons and facts upon which the protester relies in seeking reinstatement of the protest. The review unit shall review the application and notify the protester whether the application is granted or denied. If the review unit denies the application to reinstate the protest, the protester has 30 days from the date the application for reinstatement was denied in which to request, in writing, a formal hearing on the reinstatement. When a written request is received, the protest file will be transferred to the division of administrative hearings which shall issue a notice as prescribed in rule 701—7.47(17A), except that the issue of the contested case proceeding shall be limited to the question of whether the protest shall be reinstated. Thereafter, the rules of the department pertaining to contested case proceedings shall apply in such reinstatement proceedings.

d. Once contested case proceedings have been commenced, whether informal proceedings have been waived or not, it shall be grounds for a motion to dismiss that a protester has either failed to diligently pursue the protest or refuses to comply with requests for discovery set forth in rule 701—7.47(17A). Such a motion must be filed with the presiding officer.

**701—7.45(17A) Answer.** The department may, in lieu of findings, file an answer. When findings are issued, the department will file an answer within 30 days of receipt of written notification from protester stating disagreement with the findings. The answer shall be filed with the clerk of the hearings section for the department.

In the event that the protester does not so respond in writing to the findings issued on matters covered by subrule 7.44(1) within 30 days after being notified, the department may seek dismissal of the protest pursuant to subrule 7.44(2).

The answer of the department shall be drawn in a manner as provided by the Iowa rules of civil procedure for answers filed in Iowa district courts.

Each paragraph contained in the answer shall be numbered or lettered to correspond, where possible, with the paragraphs of the protest. An original copy only of the answer shall be filed with the clerk of the hearings section for the department and shall be signed by the department's counsel or representative.

The department shall forthwith serve a copy of the answer upon the representative of record or, if there is no representative of record, then upon the protester and shall file proof of service with the clerk of the hearings section of the department at the time of filing of the answer. The department may

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amend its answer at any time prior to the commencement of the evidentiary hearing.

The provisions of rule 701—7.45(17A) shall be considered as a part of the informal procedures since a contested case proceeding, at the time of filing the answer, has not yet commenced. However, an answer shall be filed pursuant to this rule whether or not informal procedures have been waived by the protester or the department.

Notwithstanding the above portions of this rule, if a taxpayer makes a written demand for a contested case proceeding, as authorized by rule 701—7.47(17A), after a period of six months from the filing of a proper protest, the department shall file its answer within 30 days after receipt of the demand. If the department fails to file its answer within this 30-day period, interest shall be suspended, if the protest involves an assessment, from the time that the department was required to answer until the date that the department files its answer and, if the protest involves a refund, interest shall accrue on the refund at double the rate from the time the department was required to answer until the date that the department files its answer.

The department's answer may contain a statement setting forth whether the case should be transferred to the division of administrative hearings or the director should retain the case for hearing.

The department's answer should set forth the basis for retention of the case by the director as provided in subrule 7.50(1). If the answer fails to allege that the case should be retained by the director, the case should be transferred to the division of administrative hearings for contested case proceedings, unless the director determines on the director's own motion that the case should be retained by the director.

This rule is intended to implement Iowa Code section 10A.202(1)"m," Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202, and Iowa Code sections 421.14 and 421.60.

**701—7.46(17A) Subpoenas.** Prior to the commencement of a contested case, the department shall have the authority to subpoena books, papers and records and shall have all other subpoena powers conferred upon it by law. Subpoenas in this case shall be issued by the director or the director's designee. Once a contested case is commenced, subpoenas must be issued by the presiding officer.

This rule is intended to implement Iowa Code section 10A.202(1)"m," Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202, and Iowa Code section 421.14.

**701—7.47(17A) Commencement of contested case proceedings.** A demand or request by the protester for the commencement of contested case proceedings must be in writing and filed with the clerk of the hearings section by electronic means, by mail via the United States Postal Service or common carrier by ordinary, certified, or registered mail in care of the clerk of the hearings section of the department, or by personal service on the office of the clerk of the hearings section for the department during business hours. The demand or request is considered filed on the date of the postmark. If the demand or request does not indicate a postmark date, then the date of receipt or the date personal service is made is considered the date of filing. See Iowa Code section 622.105 for the evidence necessary to establish proof of mailing.

Contested case proceedings will be commenced by the presiding officer by delivery of notice by ordinary mail directed to the parties after a demand or request is made (1) by

the protester and the filing of the answer, if one is required, which demand or request may include a date to be set for the hearing, or (2) upon filing of the answer, if a request or demand for contested case proceedings has not been made by the protester. The notice will be given by the presiding officer.

The presiding officer may grant a continuance of the hearing. Any change in the date of the hearing shall be set by the presiding officer. Either party may apply to the presiding officer for a specific date for the hearing. The notice shall include:

1. A statement of the time (which shall allow for a reasonable time to conduct discovery), place and nature of the hearing;

2. A statement of the legal authority and jurisdiction under which the hearing is held;

3. A reference to the particular sections of the statutes and rules involved; and

4. A short and plain statement of the matters asserted, including the issues.

After the delivery of the notice commencing the contested case proceedings, the parties may file further pleadings or amendments to pleadings as they desire. However, any pleading or amendment thereto which is filed within seven days prior to the date scheduled for the hearing or filed on the date of the hearing shall constitute good cause for the party adversely affected by the pleading or amendment to seek and obtain a continuance.

This rule is intended to implement Iowa Code sections 10A.202(1)"m," 17A.12 as amended by 1998 Iowa Acts, chapter 1202, and 421.8A.

**701—7.48(17A) Discovery.** The rules of the Supreme Court of the state of Iowa applicable in civil proceedings with respect to depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission shall apply to discovery procedures in contested case proceedings. Disputes concerning discovery shall be resolved by the presiding officer. If necessary a hearing shall be scheduled, with reasonable notice to the parties and upon hearing an appropriate order shall be issued by the presiding officer.

When the department relies on a witness in a contested case, whether or not a departmental employee, who has made prior statements or reports with respect to the subject matter of the witness' testimony, it shall, on request, make such statements or reports available to a party for use on cross-examination, unless those statements or reports are otherwise expressly exempt from disclosure by constitution or statute. Identifiable departmental records that are relevant to disputed material facts involved in a contested case shall, upon request, promptly be made available to the party unless the requested records are expressly exempt from disclosure by constitution or statute.

Evidence obtained in such discovery may be used in contested case proceedings if that evidence would otherwise be admissible in the contested case proceeding.

This rule is intended to implement Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202, and sections 421.14 and 10A.202(1)"m."

**701—7.49(17A) Prehearing conference.** Upon the motion of the presiding officer, or upon the written request of a party, the presiding officer shall direct the parties to appear at a

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specified time and place before the presiding officer for a prehearing conference to consider:

1. The possibility or desirability of waiving any provisions of the Act relating to contested case proceedings by written stipulation representing an informed mutual consent;
2. The necessity or desirability of setting a new date for hearing;
3. The simplification of issues;
4. The necessity or desirability of amending the pleadings either for the purpose of clarification, amplification or limitation;
5. The possibility of agreeing to the admission of facts, documents or records not really controverted, to avoid unnecessary introduction of proof;
6. The procedure at the hearing;
7. Limiting the number of witnesses;
8. The names and identification of witnesses and the facts each party will attempt to prove at the hearing;
9. Conduct or schedule of discovery; and
10. Such other matters as may aid, expedite or simplify in the disposition of the proceeding.

Since stipulations are encouraged, it is expected and anticipated that the parties proceeding to a hearing will stipulate to evidence to the fullest extent to which complete or qualified agreement can be reached including all material facts that are not, or should not be, fairly in dispute.

Any action taken at the prehearing conference shall be recorded in an appropriate order, unless the parties enter upon a written stipulation as to such matters or agree to a statement thereof made on the record by the presiding officer.

When an order is issued at the termination of the prehearing conference, a reasonable time shall be allowed to the parties to present objections on the grounds that it does not fully or correctly embody the agreements at such conference. Thereafter, the terms of the order or modification thereof shall determine the subsequent course of the proceedings relative to matters it includes, unless modified to prevent manifest injustice.

Without the necessity of proceeding to an evidentiary hearing in a contested case, the parties may agree in writing to informally dispose of the case by stipulation, agreed settlement, consent order, or by another method agreed upon. If such informal disposition is utilized, the parties shall so indicate to the presiding officer that the case has been settled. Upon request, the presiding officer shall issue an order to reflect such a disposition.

Unless otherwise precluded by law, the parties in a contested case proceeding may mutually agree to waive any provision under these sets of rules governing the contested case proceedings. However, the department reserves the right to refuse a waiver if, among other reasons, such waiver would not be consistent with the public interest.

If either party to the contested case proceeding fails to appear at the prehearing conference, fails to request a continuance, or fails to submit evidence or arguments which the party wishes to be considered in lieu of appearance, the opposing party may move for dismissal. The motion shall be made in accordance with subrule 7.50(4).

This rule is intended to implement Iowa Code section 17A.12 as amended by 1998 Iowa Acts, chapter 1202.

**701—7.50(17A) Contested case proceedings.** Unless the parties to a contested case proceeding have, by written stipulation representing an informed mutual consent, waived the provisions of the Act relating to such proceedings, contested case proceedings shall be initiated and culminate in an evidentiary hearing open to the public.

Evidentiary hearings in which the presiding officer is an administrative law judge employed by the division of administrative hearings, shall be held at the location designated in the notice of evidentiary hearing. Generally, the location for evidentiary hearings in such cases will be at the principal office of the Department of Inspections and Appeals, Lucas State Office Building, Des Moines, Iowa 50319.

If the director retains a contested case, generally, the location for the evidentiary hearing will be at the main office of the department at the Hoover State Office Building, Fourth Floor, Des Moines, Iowa 50309. However, the department retains the discretion to change the location of the evidentiary hearing if necessary. The location of the evidentiary hearing will be designated in the notice of hearing issued by the director.

**7.50(1) Determination of presiding officer.** If the director retains a contested case for evidentiary hearing and the department is a party, the initial presiding officer will be the director. If the department is not a party to the contested case retained by the director, the presiding officer may be the director or the director's designee. Upon determining that a case will be retained and not transferred to the division of administrative hearings, the director shall issue written notification to the parties of the determination which states the basis for retaining the case for evidentiary hearing.

A protester may file a written objection to the director's determination to retain the case for evidentiary hearing and request that the contested case be heard by an administrative law judge presiding officer and request a hearing on the objection. Such an objection must be filed with the clerk of the hearings section for the department within 20 days of the notice issued by the director of the director's determination to retain the case. The director may deny the request only upon a finding that one or more of the following apply:

- a. There is a compelling need to expedite issuance of a final decision in order to protect the public health, safety and welfare;
- b. A qualified administrative law judge is unavailable to hear the case within a reasonable time;
- c. The case involves significant policy issues of first impression that are inextricably intertwined with the factual issues presented;
- d. The demeanor of the witnesses is likely to be dispositive in resolving the disputed factual issues;
- e. The case involves an issue or issues the resolution of which would create important precedent;
- f. The case involves complex or extraordinary questions of law or fact;
- g. The case involves issues or questions of law or fact that, based on the director's discretion, should be retained by the director;
- h. Funds are unavailable to pay the costs of an administrative law judge and an interagency appeal;
- i. The request was not timely filed; and
- j. The request is not consistent with a specified statute.

The director shall issue a written ruling specifying the grounds for the decision within 20 days after a request for an administrative law judge is filed. If a party objects to the director's determination to retain a case for evidentiary hearing, transfer of the protest file, if any, will be made after the director makes a final determination on the objection. If the ruling is contingent upon the availability of a qualified administrative law judge, the parties shall be notified at least ten days prior to the hearing if a qualified administrative law judge will be available.

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The director has the right to require that any presiding officer, other than the director, be a licensed attorney in the state of Iowa, unless the contested case only involves licensing. In addition, any presiding officer must possess, upon determination by the director, sufficient technical expertise and experience in the areas of taxation and presiding over proceedings to effectively determine the issues involved in the proceeding.

Except as provided otherwise by another provision of law, all rulings by an administrative law judge acting as presiding officer are subject to appeal to the director.

**7.50(2) Conduct of proceedings.** A proceeding shall be conducted by a presiding officer who, among other things, shall:

- a. Open the record and receive appearances;
- b. Administer oaths and issue subpoenas;
- c. Enter the notice of hearing into the record;
- d. Receive testimony and exhibits presented by the parties;
- e. In the presiding officer's discretion, interrogate witnesses;
- f. Rule on objections and motions;
- g. Close the hearing; and
- h. Issue an order containing findings of fact and conclusions of law.

The presiding officer may resolve preliminary procedural motions by telephone conference in which all parties have an opportunity to participate. Other telephone proceedings may be held with the consent of all parties. The presiding officer will determine the location of the parties and witnesses for telephone hearing. The convenience of the witnesses or parties, as well as the nature of the case, will be considered when location is chosen. Parties shall be notified at least 30 days in advance of the date and place of the hearing.

Evidentiary proceedings shall be oral and open to the public and shall be recorded either by mechanical means or by certified shorthand reporters. Parties requesting that the hearing be recorded by certified shorthand reporters shall bear the appropriate costs. The record of the oral proceedings or the transcription thereof, shall be filed with and maintained by the department for at least five years from the date of the decision. An opportunity shall be afforded to the parties to respond and present evidence and argument on all issues involved and to be represented by counsel at their own expense. Unless otherwise directed by the presiding officer, evidence will be received in the following order: (1) protester, (2) intervenor (if applicable), (3) department, (4) rebuttal by protester, (5) oral argument by parties (if necessary).

If the protester or the department appears without counsel or other representative who can reasonably be expected to be familiar with these rules, the presiding officer shall explain to the parties the rules of practice and procedure and generally conduct a hearing in a less formal manner than that used when the parties have such representatives appearing upon their behalf. It should be the purpose of the presiding officer to assist any party appearing without such representative to the extent necessary to allow the party to fairly present evidence, testimony, and arguments on the issues. The presiding officer shall take whatever steps may be necessary and proper to ensure that all evidence having probative value is presented and that each party is accorded a fair hearing.

If the parties have mutually agreed to waive the provisions of the Act in regard to contested case proceedings, the hearing will be conducted in a less formal manner than when an evidentiary hearing is conducted.

If a party fails to appear in a contested case proceeding after proper service of notice, the presiding officer may, upon the presiding officer's own motion or upon the motion of the party who has appeared, adjourn the hearing, enter a default decision, or proceed with the hearing and make a decision on the merits in the absence of the party.

Contemptuous conduct by any person appearing at a hearing shall be grounds for the person's exclusion from the hearing by the presiding officer.

A stipulation by the parties of the issues or a statement of the issues in the notice commencing the contested case cannot be changed by the presiding officer without the consent of the parties. The presiding officer shall not, on the presiding officer's own motion, change or modify the issues agreed upon by the parties. Notwithstanding the provisions of this paragraph, a party within a reasonable time prior to the hearing may request that a new issue be addressed in the proceedings, except that the request cannot be made after the parties have stipulated to the issues.

**7.50(3) Rules of evidence.** In evaluating evidence, the department's experience, technical competence, and specialized knowledge may be utilized.

a. Oath. All testimony presented before the presiding officer shall be given under oath which the presiding officer has authority to administer.

b. Production of evidence and testimony. The presiding officer may issue subpoenas to a party on request, as permitted by law, compelling the attendance of witnesses and the production of books, papers, records, or other real evidence.

c. Subpoena. When a subpoena is desired after the commencement of a contested case proceeding, the proper party shall indicate to the presiding officer the name of the case, the docket number and the last-known addresses of the witnesses to be called. If evidence other than oral testimony is required, each item to be produced must be adequately described. When properly prepared by the presiding officer, the subpoena will be returned to the requesting party for service. Service may be made in any manner allowed by law before the hearing date of the case which the witness is required to attend. No costs for serving a subpoena will be allowed if it is served by any person other than the sheriff. Subpoenas requested for discovery purposes shall be issued by the presiding officer.

d. Admissibility of evidence.

(1) Evidence having probative value. Although the presiding officer is not bound to follow the technical common law rules of evidence, a finding shall be based upon the kind of evidence on which reasonably prudent persons are accustomed to rely for the conduct of their serious affairs, and may be based upon such evidence even if it would be inadmissible in a jury trial. Therefore, the presiding officer may admit and give probative effect to evidence on which reasonably prudent persons are accustomed to rely for the conduct of their serious affairs. Irrelevant, immaterial, or unduly repetitious evidence shall be excluded. The presiding officer shall give effect to the rules of privilege recognized by law. Evidence not provided to a requesting party through discovery shall not be admissible at the hearing. Subject to these requirements, when a hearing will be expedited and the interests of the parties will not be prejudiced, substantially any part of the evidence may be required to be submitted in verified written form by the presiding officer.

Objections to evidentiary offers may be made at the hearing and the presiding officer's ruling thereon shall be noted in the record.

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(2) Evidence of a federal determination. Evidence of a federal determination whether it be a treasury department ruling, regulation or determination letter, a federal court decision or an Internal Revenue Service assessment relating to issues raised in the proceeding shall be admissible, and the protester shall be presumed to have conceded the accuracy of it unless the protester specifically states wherein it is erroneous.

(3) Copies of evidence. A copy of any book, record, paper or document may be offered directly in evidence in lieu of the original, if the original is not readily available or if there is no objection. Upon request, the parties shall be given an opportunity to compare the copy with the original, if available.

(4) Stipulations. Approval of the presiding officer is not required for stipulations of the parties to be used in contested case proceedings. In the event the parties file a stipulation in the proceedings, the stipulation shall be binding on the parties and the presiding officer.

e. Exhibits.

(1) Identification of exhibits. Exhibits attached to a stipulation or entered in evidence which are offered by protesters shall be numbered serially, i.e., 1, 2, 3, etc.; whereas, those offered by the department shall be lettered serially, i.e., A, B, C, etc.; and those offered jointly shall be numbered and lettered, i.e., 1-A, 2-B, 3-C, etc.

(2) Disposition of exhibits. After an order has become final, either party desiring the return, at the party's expense, of any exhibit belonging to the party, shall make application in writing to the clerk of the hearings section for the department within 30 days suggesting a practical manner of delivery; otherwise, exhibits may be disposed of as the clerk of the hearings section for the department deems advisable.

f. Official notice. The presiding officer may take official notice of all facts of which judicial notice may be taken. Parties shall be notified at the earliest practicable time, either before or during the hearing, or by reference in preliminary reports, preliminary decisions or otherwise, of the facts proposed to be noticed and their source, including any staff memoranda or data. The parties shall be afforded an opportunity to contest such facts prior to the issuance of the decision in the contested case proceeding unless the presiding officer determines as a part of the record or decision that fairness to the parties does not require an opportunity to contest such facts.

g. Evidence outside the record. Except as provided by these rules, the presiding officer shall not consider factual information or evidence in the determination of any proceeding unless the same shall have been offered and made a part of the record in the proceeding.

h. Presentation of evidence and testimony. In any hearing each party thereto shall have the right to present evidence and testimony of witnesses and to cross-examine any witness who testifies on behalf of an adverse party. Persons whose testimony has been submitted in written form, if available, shall also be subject to cross-examination by an adverse party. Opportunity shall be afforded each party for re-direct examination and re-cross examination and to present evidence and testimony as rebuttal to evidence presented by another party, except that unduly repetitious evidence shall be excluded.

i. Offer of proof. An offer of proof may be made through the witness or by statement of counsel. The party objecting may cross-examine the witness without waiving any objection.

**7.50(4) Motions.** After commencement of contested case proceedings, appropriate motions may be filed by any party with the presiding officer when facts requiring such motion come to the knowledge of the party. All motions shall state the relief sought and the grounds upon which the same are based.

Motions made prior to a hearing shall be in writing and a copy thereof served on all parties and attorneys of record. Such motions shall be ruled on by the presiding officer. The presiding officer shall rule on the motion by issuing an order. A copy of the order containing the ruling on the motion shall be mailed to the parties and authorized representatives. Motions may be made orally during the course of a hearing; however, the presiding officer may request that it be reduced to writing and filed with the presiding officer.

To avoid a hearing on a motion, it is advisable to secure the consent of the opposing party prior to filing the motion. If consent of the opposing party to the motion is not obtained, a hearing on the motion may be scheduled and the parties notified. The burden will be on the party filing the motion to show good cause why the motion should be granted.

The party making the motion may affix thereto such affidavits as are deemed essential to the disposition of the motion, which shall be served with the motion and to which the opposing party may reply with counter affidavits.

a. Types of motions. Types of motions include, but are not limited to:

(1) Motion for continuance. Motions for continuance should be filed no later than ten days before the scheduled date of the contested case hearing unless the grounds for the motion are first known to the moving party within ten days of the hearing, in which case the motion shall be promptly filed and shall set forth why it could not be filed at least ten days prior to the hearing. Grounds for motion for continuance include, but are not limited to, the following:

1. Unavailability of a party, a party's representative or a witness;

2. Incompletion of discovery; and

3. Possibility of settlement of the case.

(2) Motion for dismissal;

(3) Motion for summary judgment;

(4) Motion to delete identifying details in the decision;

(5) Motion for default; and

(6) Motion to vacate default.

b. Hearing on motions. Motions subsequent to the commencement of a contested case proceeding shall be determined by the presiding officer.

c. Summary judgment procedure. Summary judgment may be obtained under the following conditions and circumstances:

(1) A party may, after a reasonable time to complete discovery, after completion of discovery, or by agreement of the parties, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part of a party's claim or defense.

(2) The motion shall be filed not less than 45 days prior to the date the case is set for hearing, unless otherwise ordered by the presiding officer. Any party resisting the motion shall file within 30 days from the time of service of the motion a resistance; statement of disputed facts, if any; and memorandum of authorities supporting the resistance. If affidavits supporting the resistance are filed, they must be filed with the resistance. The time fixed for hearing or normal submission on the motion shall be not less than 35 days after the filing of the motion, unless another time is ordered by the presiding officer. The judgment sought shall be rendered forth-

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with if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

(3) Upon any motion for summary judgment pursuant to this rule, there shall be affixed to the motion a separate, short, and concise statement of the material facts as to which the moving party contends there is no genuine issue to be tried, including specific reference to those parts of the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits which support such contentions and a memorandum of authorities.

(4) Supporting and opposing affidavits shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. The presiding officer may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, further affidavits, or oral testimony. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the party's pleading, but the party's response must set forth specific facts, by affidavits or as otherwise provided in this rule, showing that there is a genuine issue for hearing. If the party does not so respond, summary judgment, if appropriate, shall be entered against the party.

(5) If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a hearing is necessary, the presiding officer at the hearing of the motion, by examining the pleadings and the evidence before the presiding officer and by interrogating counsel, shall, if practicable, ascertain what material facts exist without substantial controversy and what material facts are actually, and in good faith, controverted. The presiding officer shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the hearing of the contested case, the facts so specified shall be deemed established, and the hearing shall be conducted accordingly.

(6) Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present, by affidavit, facts essential to justify the party's opposition, the presiding officer may refuse the application for judgment, may order a continuance to permit affidavits to be obtained, may order depositions be taken or discovery be completed, or may make any other order appropriate.

(7) An order on summary judgment that disposes of less than the entire case is appealable to the director at the same time that the proposed order is appealable pursuant to subrule 7.50(7).

**7.50(5) Briefs and oral argument.** At any time, upon the request of any party or in the presiding officer's discretion, the presiding officer may require the filing of briefs on any of the issues before the presiding officer prior to or at the time of hearing, or at a subsequent time. At the hearing, the parties should be prepared to make oral arguments as to the facts and law at the conclusion of the hearing if the presiding officer so directs.

An original copy only of all briefs shall be filed. Filed briefs shall conform to the requirements of 701—7.5(17A).

If the parties agree on a schedule for submission of briefs, the schedule shall be binding on the parties and the presiding

officer except that, for good cause shown, the time may be extended upon application of a party.

**7.50(6) Defaults.** If a party fails to appear or participate in a contested case proceeding after proper service of notice, the presiding officer may, if no adjournment is granted, enter a default decision or proceed with the hearing and render a decision in the absence of the party.

a. Where appropriate and not contrary to law, any party may move for default against a party who has failed to file a required pleading or has failed to appear after proper service.

b. A default decision or a decision rendered on the merits after a party failed to appear or participate in a contested case proceeding becomes a final department action unless, within 15 days after the date of notification or mailing of the decision, a motion to vacate is filed and served on all parties or an appeal of a decision on the merits is timely initiated within the time provided in subrule 7.50(7). A motion to vacate must state all facts relied upon by the moving party which establish that good cause existed for that party's failure to appear or participate at the contested case proceeding. Each fact so stated must be substantiated by at least one sworn affidavit of a person with personal knowledge of each such fact, and such affidavit(s) must be attached to the motion.

c. The time for further appeal of a decision for which a timely motion to vacate has been filed is stayed pending a decision on the motion to vacate.

d. Properly substantiated and timely filed motions to vacate shall be granted only for good cause shown. The burden of proof as to good cause is on the moving party. Adverse parties shall have ten days to respond to a motion to vacate. Adverse parties shall be allowed to conduct discovery as to the issue of good cause and to present evidence on the issue prior to a decision on the motion, if a request to do so is included in that party's response.

e. "Good cause" for purposes of this rule shall have the same meaning as "good cause" as interpreted in the case of *Purethane, Inc. v. Iowa State Board of Tax Review*, 498 N.W.2d 706 (Iowa 1993).

f. A decision denying a motion to vacate is subject to further appeal within the time limit allowed for further appeal of a decision on the merits in the contested case proceeding. A decision granting a motion to vacate is subject to interlocutory appeal by the adverse party as provided in subrule 7.50(12).

g. If a motion to vacate is granted and no timely interlocutory appeal has been taken, the presiding officer shall issue another notice of hearing and the contested case shall proceed accordingly.

h. A default decision may award any relief consistent with the request for relief by the party in whose favor the default decision is made and embraced in the contested case issues but unless the defaulting party has appeared, it cannot exceed the relief demanded.

i. A default decision may provide either that the default decision is to be stayed pending a timely motion to vacate or that the default decision is to take effect immediately, subject to a request for a stay.

**7.50(7) Orders.** At the conclusion of the hearing, the presiding officer in the presiding officer's discretion, may request the parties to submit proposed findings of fact and conclusions of law. Upon the request of any party, the presiding officer shall allow the parties an opportunity to submit proposed findings of fact and conclusions of law.

The decision in a contested case is an order which shall be in writing or stated in the record. The order shall include

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findings of fact prepared by the person presiding at the hearing, unless the person is unavailable, and based solely on the evidence in the record and on matters officially noticed in the record, and shall include conclusions of law. The findings of fact and conclusions of law shall be separately stated. If a party has submitted proposed findings of fact, the order shall include a ruling upon each proposed finding. Each conclusion of law shall be supported by cited authority or by a reasoned opinion. The decision must include an explanation of why the relevant evidence in the record supports each material finding of fact. If the issue of reasonable litigation costs was held in abeyance pending the outcome of the substantive issues in the contested case and the proposed order decides substantive issues in favor of protester, the proposed order shall include a notice of time and place for a hearing on the issue of whether reasonable litigation costs shall be awarded and on the issue of the amount of such award, unless the parties agree otherwise.

When a motion has been made to delete identifying details in an order on the basis of personal privacy or trade secrets, the justification for such deletion or refusal to delete shall be made by the moving party and shall appear in the order.

When the director initially presides at a hearing or considers decisions on appeal from or review of a proposed decision by the presiding officer other than the director, the order becomes the final order of the department for purposes of judicial review or rehearing unless there is an appeal to or review on motion of a second agency within the time provided by statute or rule. When a presiding officer other than the director presides at the hearing, the order becomes the final order of the department for purposes of judicial review or rehearing unless there is an appeal to, or review on motion of the director within 30 days of the date of the order, or 10 days, excluding Saturdays, Sundays, and legal holidays, for a revocation order pursuant to rule 701—7.55(17A). However, if the contested case proceeding involves a question of an award of reasonable litigation costs, the proposed order on the substantive issues shall not be appealable to or reviewable by the director on the director's motion until the issuance of a proposed order on the reasonable litigation costs. If there is no such appeal or review within 30 days or 10 days, whichever is applicable, from the date of the proposed order on reasonable litigation costs, both the proposed order on the substantive issues and the proposed order on the reasonable litigation costs become the final orders of the department for purposes of judicial review or rehearing. On an appeal from, review of, or application for rehearing concerning the presiding officer's order, the director has all the power which the director would initially have had in making the decision; however, the director will only consider those issues or selected issues presented at the hearing before the presiding officer or any issues of fact or law raised independently by the presiding officer, including the propriety of and the authority for raising issues. The parties will be notified of those issues which will be considered by the director.

In the event of an appeal to or review of the proposed order by the director, the administrative hearings division shall be promptly notified of the appeal or review by the director. The administrative hearings division shall, upon such notice, promptly forward the record of the contested case proceeding and all other papers associated with the case to the director.

A decision by the director may reverse or modify any finding of fact if a preponderance of the evidence will support a determination to reverse or modify such a finding of

fact, or may reverse or modify any conclusion of law that the director finds to be in error.

Orders will be issued within a reasonable time after termination of the hearing. Parties shall be promptly notified of each order by delivery to them of a copy of the order by personal service or certified mail, return receipt requested, except in the case of an order revoking a sales or use tax permit or a motor fuel license which may be delivered by ordinary mail.

A cross-appeal may be taken within the 30-day period for taking an appeal to the director of revenue and finance or in any event within 5 days after the appeal to the director is taken. If a cross-appeal is taken from a revocation order pursuant to rule 701—7.55(17A), the cross-appeal may be taken within the 10-day period for taking an appeal to the director or in any event within 5 days after the appeal to the director is taken.

**7.50(8) Stays.** During the pendency of judicial review of the final contested case order of the department, the party seeking judicial review may file an application for a stay with the director. The application shall set forth the reasons in detail why the applicant is entitled to a stay and shall specifically address the following four factors:

- a. The extent to which the applicant is likely to prevail when the court finally disposes of the matter;
- b. The extent to which the applicant will suffer irreparable injury if the stay is not granted;
- c. The extent to which the grant of a stay to the applicant will substantially harm the other parties to the proceedings; and
- d. The extent to which the public interest relied on by the department is sufficient to justify the department's actions in the circumstances.

The director shall consider and balance the previously mentioned four factors and may consult with department personnel and the department's representatives in the judicial review proceeding. The director shall expeditiously grant or deny the stay.

**7.50(9) Expedited cases—when applicable.** In case a protest is filed where the case is not of precedential value and the parties desire a prompt resolution of the dispute, the department and the protester may agree to have the case designated as an expedited case.

a. **Agreement.** The department and the protester shall execute an agreement to have the case treated as an expedited case. In this case, discovery is waived. The provisions of this agreement shall constitute a waiver of the rights set forth in Iowa Code chapter 17A for contested case proceedings. Within 30 days of written notice to the clerk of the hearings section for the department sent by the parties stating that an agreement to expedite the case has been executed, the clerk of the hearings section for the department must transfer the protest file to the division of administrative hearings.

b. **Finality of decision.** A decision entered in an expedited case proceeding shall not be reviewed by the director, state board of tax review, or any other court, and shall not be treated as a precedent for any other case.

c. **Discontinuance of proceedings.** Any time prior to a decision's being rendered, the taxpayer or the department may request that expedited case proceedings be discontinued if there are reasonable grounds to believe that the issues in dispute would be of precedential value.

d. **Procedure.** Upon return of an executed agreement for this procedure, the department shall within 14 days file its answer to the protest. The case shall be docketed for hearing

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as promptly as the presiding officer can reasonably hear the matter.

**7.50(10) Burden of proof.** The burden of proof with respect to assessments or denials of refunds in contested case proceedings is as follows:

a. The department must carry the burden of proof by clear and convincing evidence as to the issue of fraud with intent to evade tax.

b. The burden of proof is on the department for any tax periods for which the assessment was not made within six years after the return became due, excluding any extension of time for filing such return, except where the department's assessment is the result of the final disposition of a matter between the taxpayer and the Internal Revenue Service or where the taxpayer and the department signed a waiver of the statute of limitations to assess.

c. The burden of proof is on the department as to any new matter or affirmative defense raised by the department. "New matter" means an adjustment not set forth in the computation of the tax in the assessment or refund denial, as distinguished from a new reason for the assessment or refund denial. "Affirmative defense" is one resting on facts not necessary to support the taxpayer's case.

d. In all instances where the burden of proof is not expressly placed upon the department in this subrule, the burden of proof is upon the protester.

**7.50(11) Costs.** A prevailing taxpayer in a contested case proceeding related to the determination, collection, or refund of a tax, penalty, or interest may be awarded reasonable litigation costs by the department incurred subsequent to the issuance of the notice of assessment or refund denial based upon the following:

a. The reasonable expenses of expert witnesses.

b. The reasonable costs of studies, reports, and tests.

c. The reasonable fees of independent attorneys or independent accountants retained by the taxpayer. No such award is authorized for accountants or attorneys who represent themselves or who are employees of the taxpayer.

d. An award for reasonable litigation costs shall not exceed \$25,000 per case.

e. No award shall be made for any portion of the proceeding which has been unreasonably protracted by the taxpayer.

f. For purposes of this subrule, "prevailing taxpayer" means a taxpayer who establishes that the position of the department in the contested case proceeding was not substantially justified and who has substantially prevailed with respect to the amount in controversy, or has substantially prevailed with respect to the most significant issue or set of issues presented. If the position of the department in issuance of the assessment or refund denial was not substantially justified and if the matter is resolved or conceded before the contested case proceeding is commenced, there cannot be an award for reasonable litigation costs.

g. The definition of "prevailing taxpayer" is taken from the definition of "prevailing party" in 26 U.S.C. §7430. Therefore, federal cases determining whether the Internal Revenue Service's position was substantially justified will be considered in the determination of whether a taxpayer is entitled to an award of reasonable litigation costs to the extent that 26 U.S.C. §7430 is consistent with Iowa Code section 421.60(4).

h. The taxpayer has the burden of establishing the unreasonableness of the department's position.

i. Once a contested case has commenced, a concession by the department of its position or a settlement of the case

either prior to the evidentiary hearing or any order issued does not, per se, either authorize an award of reasonable litigation costs or preclude such award.

j. If the department relied upon information provided or action conducted by federal, state, or local officials or law enforcement agencies with respect to the tax imposed by Iowa Code chapter 453B, an award for reasonable litigation costs shall not be made in a contested case proceeding involving the determination, collection, or refund of that tax.

k. The taxpayer who seeks an award of reasonable litigation costs must specifically request such award in the protest or it will not be considered.

l. A request for an award of reasonable litigation costs shall be held in abeyance until the concession or settlement of the contested case proceeding, or the issuance of a proposed order in the contested case proceeding, unless the parties agree otherwise.

m. At the hearing held for the purpose of deciding whether an award for reasonable litigation costs should be awarded, consideration shall be given to the following points:

(1) Whether the department's position was substantially justified;

(2) Whether the protester is the prevailing taxpayer;

(3) The burden is upon protester to establish how the alleged reasonable litigation costs were incurred. This requires a detailed accounting of the nature of each cost, the amount of each cost, and to whom the cost was paid or owed;

(4) Whether alleged litigation costs are reasonable or necessary;

(5) Whether protester has met its burden of demonstrating all of these points.

**7.50(12) Interlocutory appeals.** Upon written request of a party or on the director's own motion, the director may review an interlocutory order of the presiding officer. In determining whether to do so, the director shall weigh the extent to which granting the interlocutory appeal would expedite final resolution of the case and the extent to which review of that interlocutory order by the director at the time of the review of the proposed decision of the presiding officer would provide an adequate remedy. Any request for interlocutory review must be filed within 14 days of issuance of the challenged order, but no later than the time for compliance with the order or the date of hearing, whichever is first.

Interlocutory appeals do not apply to licensing.

**7.50(13) Consolidation and severance.**

a. Consolidation. The presiding officer may consolidate any or all matters at issue in two or more contested case proceedings where:

(1) The matters at issue involve common parties or common questions of fact or law;

(2) Consolidation would expedite and simplify consideration of the issues involved; and

(3) Consolidation would not adversely affect the rights of any of the parties to those proceedings.

b. Severance. The presiding officer may, for good cause shown, order any contested case proceedings or portions thereof severed.

This rule is intended to implement Iowa Code sections 10A.202(1)"m," 17A.15(3) as amended by 1998 Iowa Acts, chapter 1202, 421.60, 422.57(1) and 452A.68.

**701—7.51(17A) Record and transcript.** The record in a contested case shall include:

1. All pleadings, motions and rulings;

2. All evidence received or considered and all other submissions;

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3. A statement of all matters officially noticed;
4. All questions and offers of proof, objections, and rulings thereon;
5. All proposed findings and exceptions;
6. All orders of the presiding officer; and
7. The order of the director on appeal or review.

Oral hearings regarding proceedings on appeal to or considered on motion of the director which are recorded by mechanical means shall not be transcribed for the record of such appeal or review unless a party, by written notice, or the director, orally or in writing, requests such transcription. Such a request must be filed with the clerk of the hearings section for the department who will be responsible for making the transcript. A transcription will be made only of that portion of the oral hearing relevant to the appeal or review, if so requested, and no objection is made by any other party to the proceeding or the director. Upon request, the department shall provide a copy of the whole or any portion of the record at cost. The cost of preparing a copy of the record or of transcribing the hearing record shall be paid by the requesting party.

Parties who request that a hearing be recorded by certified shorthand reporters rather than by electronic means shall bear the cost of that recordation, unless otherwise provided by law.

Where the administrative hearings division issues a proposed order which becomes the final order of the department because of lack of timely appeal to or review by the director, the division, upon receiving notice from the director or the director's designee, shall promptly forward the record of the contested case proceeding to the director.

**701—7.52(17A) Rehearing.** Any party to a contested case may file an application with the director for a rehearing in the contested case, stating the specific grounds therefor and the relief sought. The application must be filed within 20 days after the final order is issued. See subrule 7.50(7) as to when a proposed order becomes a final order. A copy of such application shall be timely mailed by the applicant to all parties in conformity with rule 701—7.53(17A). The director shall have 20 days from the filing of the application to grant or deny the rehearing. If the application is granted, a notice will be served on the parties stating the time and place of the rehearing. An application for rehearing shall be deemed denied if not granted by the director within 20 days after filing.

The application for rehearing which is filed shall contain a caption in the following form:

BEFORE THE DEPARTMENT OF REVENUE AND FINANCE  
HOOVER STATE OFFICE BUILDING  
DES MOINES, IOWA

IN THE MATTER OF _____	}	APPLICATION FOR REHEARING DOCKET NO. _____
(state taxpayer's name and address and designate type of proceeding, e.g., income tax refund claim).		

The application for rehearing shall substantially state in separate numbered paragraphs the following:

1. Clear and concise statements of the reasons for requesting a rehearing and each and every error which the party alleges to have been committed during the contested case proceedings;
2. Clear and concise statements of all relevant facts upon which the party relies;

3. Reference to any particular statute or statutes and any rule or rules involved;

4. The signature of the party or that of the party's representative, the addresses of the party or the party's representative, and the telephone number of the party or the party's representative.

No applications for rehearing shall be filed with or entertained by an administrative law judge.

This rule is intended to implement Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202.

**701—7.53(17A) Service.** All papers or documents required by 701—Chapter 7 to be filed with the department or the presiding officer and served upon the opposing party or other person shall be served by ordinary mail unless another rule specifically refers to another method. All notices required by 701—Chapter 7 to be served on parties or persons by the department or presiding officer shall be served by ordinary mail unless another rule specifically refers to another method.

This rule is intended to implement Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202.

**701—7.54(17A) Ex parte communications and disqualification.**

**7.54(1)** Ex parte communication. A party that has knowledge of a prohibited communication by any party or presiding officer should file a copy of the written prohibited communication or a written summary of the prohibited oral communication with the clerk of the hearings section for the department. The clerk of the hearings section for the department is to transfer the filed copy of the prohibited communication to the presiding officer.

a. Prohibited communications. Unless required for the disposition of ex parte matters specifically authorized by statute, following issuance of the notice of hearing, there shall be no communication, directly or indirectly, between the presiding officer and any party or representative of any party or any other person with a direct or indirect interest in such case in connection with any issue of fact or law in the case except upon notice and opportunity for all parties to participate. This does not prohibit persons jointly assigned such tasks from communicating with each other. Nothing in this provision is intended to preclude the presiding officer from communicating with members of the department or seeking the advice or help of persons other than those with a personal interest in, or those engaged in personally investigating as defined in this rule, prosecuting, or advocating in, either the case under consideration or a pending factually related case involving the same parties as long as those persons do not directly or indirectly communicate to the presiding officer any ex parte communications they have received of a type that the presiding officer would be prohibited from receiving or that furnish, augment, diminish, or modify the evidence in the record.

Prohibitions on ex parte communications commence with the issuance of the notice of hearing in a contested case and continue for as long as the case is pending.

b. "Ex parte" communication defined. Written, oral or other forms of communication are "ex parte" if made without notice and opportunity for all parties to participate.

c. How to avoid prohibited communications. To avoid prohibited ex parte communications, notice must be given in a manner reasonably calculated to give all parties a fair opportunity to participate. Notice of written communications shall be provided in compliance with rules in this division and may be supplemented by telephone, facsimile, electronic mail or other means of notification. Where permitted, oral

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communications may be initiated through conference telephone calls, including all parties or their representatives.

d. Joint presiding officers. Persons who jointly act as presiding officer in a pending contested case may communicate with each other without notice or opportunity for parties to participate.

e. Advice to presiding officer. Persons may be present in deliberations or otherwise advise the presiding officer without notice or opportunity for parties to participate as long as they are not disqualified from participating in the making of a proposed or final decision under any provision of law and they comply with the rules in this division.

f. Procedural communications. Communications with the presiding officer involving uncontested scheduling or procedural matters do not require notice or opportunity for parties to participate. Parties should notify other parties prior to initiating such contact with the presiding officer when feasible, and shall notify other parties when seeking to continue hearings or other deadlines.

g. Disclosure of prohibited communications. A presiding officer who receives a prohibited ex parte communication during the pendency of a contested case must initially determine if the effect of the communication is so prejudicial that the presiding officer should be disqualified. If the presiding officer determines that disqualification is warranted, a copy of any prohibited written communication, all written responses to the communication, a written summary stating the substance of any prohibited oral or other communication not available in written form for disclosure, all responses made, and the identity of each person from whom the presiding officer received a prohibited ex parte communication, shall be submitted for inclusion in the record under seal by protective order. If the presiding officer determines that disqualification is not warranted, such documents shall be submitted for inclusion in the record and served on all parties. Any party desiring to rebut the prohibited communication must be allowed the opportunity to do so upon written request filed within ten days after notice of the communication.

h. Disclosure by presiding officer. Promptly after being assigned to serve as presiding officer at any stage in a contested case proceeding, a presiding officer shall disclose to all parties material factual information received through ex parte communication prior to such assignment unless the factual information has already been or shortly will be disclosed pursuant to Iowa Code section 17A.13(2) or through discovery. Factual information contained in an investigative report or similar document need not be separately disclosed by the presiding officer as long as such documents have been or will shortly be provided to the parties.

i. Sanction. The presiding officer may render a proposed or final decision imposing appropriate sanctions for violations of this rule, including default, a decision against the offending party, censure, suspension, or revocation of the privilege to practice before the department or the administrative hearings division. Violation of ex parte communication prohibitions by department personnel or their representatives shall be reported to the clerk of the hearings section for the department for possible sanctions including censure, suspension, dismissal, or other disciplinary action.

**7.54(2)** Disqualification of a presiding officer. Request for disqualification of a presiding officer must be filed in the form of a motion supported by an affidavit asserting an appropriate ground for disqualification. A substitute presiding officer may be appointed by the division of administrative hearings pursuant to 1998 Iowa Acts, chapter 1202, section

15, if the disqualified presiding officer is an administrative law judge. If the disqualified presiding officer is the director, the governor must appoint a substitute presiding officer.

a. Grounds for disqualification. A presiding officer or other person shall withdraw from participation in the making of any proposed or final decision in a contested case if that person:

(1) Has a personal bias or prejudice concerning a party or a representative of a party;

(2) Has personally investigated, prosecuted or advocated in connection with that case, the specific controversy underlying that case, another pending factually related contested case, or a pending factually related controversy that may culminate in a contested case involving the same parties.

(3) Is subject to the authority, direction or discretion of any person who has personally investigated, prosecuted or advocated in connection with that contested case, the specific controversy underlying that contested case, or a pending factually related contested case or controversy involving the same parties;

(4) Has acted as counsel to any person who is a private party to that proceeding within the past two years;

(5) Has a personal financial interest in the outcome of the case or any other significant personal interest that could be substantially affected by the outcome of the case;

(6) Has a spouse or relative within the third degree of relationship that:

1. Is a party to the case, or an officer, director or trustee of a party;

2. Is a lawyer in the case;

3. Is known to have an interest that could be substantially affected by the outcome of the case; or

4. Is likely to be a material witness in the case; or

(7) Has any other legally sufficient cause to withdraw from participation in the decision making in that case.

b. "Personally investigated" means taking affirmative steps to interview witnesses directly or to obtain documents or other information directly. The term "personally investigated" does not include general direction and supervision of assigned investigators, unsolicited receipt of information which is relayed to assigned investigators, review of another person's investigative work product in the course of determining whether there is probable cause to initiate a proceeding, or exposure to factual information while performing other department functions, including fact gathering for purposes other than investigation of the matter which culminates in a contested case. Factual information relevant to the merits of a contested case received by a person who later serves as presiding officer in that case shall be disclosed if required by 1998 Iowa Acts, chapter 1202, section 19(3), and these rules.

c. Disqualification and the record. In a situation where a presiding officer or other person knows of information which might reasonably be deemed to be a basis for disqualification and decides voluntary withdrawal is unnecessary, that person shall submit the relevant information for the record by affidavit and shall provide for the record a statement of the reasons for the determination that withdrawal is unnecessary.

d. Motion asserting disqualification. If a party asserts disqualification on any appropriate ground, the party shall file a motion supported by an affidavit pursuant to 1998 Iowa Acts, chapter 1202, section 19(7). The motion must be filed as soon as practicable after the reason alleged in the motion becomes known to the party. If, during the course of the hearing, a party first becomes aware of evidence of bias or

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other grounds for disqualification, the party may move for disqualification but must establish the grounds by the introduction of evidence into the record.

If the presiding officer determines that disqualification is appropriate, the presiding officer or other person shall withdraw. If the presiding officer determines that withdrawal is not required, the presiding officer shall enter an order to that effect. A party asserting disqualification may seek an interlocutory appeal and seek a stay as provided under this division.

**701—7.55(17A) Licenses.**

**7.55(1)** Denial of license, refusal to renew license. When the department is required by constitution or statute to provide notice and an opportunity for an evidentiary hearing prior to the refusal or denial of a license, a notice, as prescribed in 701—7.47(17A), shall be served by the department upon the licensee or applicant. Prior to the refusal or denial of a license, the department shall give 30 days' written notice to the applicant or licensee in which to appear at a hearing to show cause why a license should not be refused or denied. In addition to the requirements of 701—7.47(17A) the notice shall contain a statement of facts or conduct and the provisions of law which warrant the denial of the license or the refusal to renew a license. If the licensee so desires, the licensee may file a petition as provided in subrule 7.55(3) with the presiding officer within 30 days prior to the hearing. The department may, in its discretion, file an answer to a petition filed by the licensee prior to the hearing. Thereafter, the rules contained in this division governing contested case proceedings shall apply.

When a licensee has made timely and sufficient application for the renewal of a license or a new license with reference to any activity of a continuing nature, the existing license does not expire until the application has been finally determined by the department, and in case the application is denied or the terms of the new license limited, until the last date for seeking judicial review of the department's order or a later date fixed by order of the department or the reviewing court. See 195—subrule 20.4(1) regarding gambling license applications.

**7.55(2)** Revocation of license. The department shall not revoke, suspend, annul or withdraw any license until written notice is served by personal service or restricted certified mail pursuant to 701—7.47(17A) within the time prescribed by the applicable statute and the licensee whose license is to be revoked, suspended, annulled or withdrawn, is given an opportunity to show at an evidentiary hearing conducted pursuant to the rules governing contested case proceedings in this chapter compliance with all lawful requirements for the retention of the license. However, in the case of the revocation, suspension, annulment, or withdrawal of a sales or use tax permit, written notice will be served pursuant to 701—7.47(17A) only if the permit holder requests that this be done following notification, by ordinary mail, of the director's intent to revoke, suspend, annul, or withdraw the permit. In addition to the requirements of 701—7.47(17A) the notice shall contain a statement of facts or conduct and the provisions of law which warrant the revocation, suspension, annulment, or withdrawal of the license. A licensee whose license may be revoked, suspended, annulled, or withdrawn, may file a petition as provided in subrule 7.55(3) with the clerk of the hearings section for the department prior to the hearing. The department may, in its discretion, file an answer to a petition filed by the licensee prior to the hearing. Thereafter, the rules contained in this division governing contested case proceedings shall apply.

Notwithstanding the above, if the department finds that public health, safety, or welfare imperatively requires emergency action, and incorporates a finding to that effect in an order to the licensee, summary suspension of a license shall be ordered pending proceedings for revocation as provided herein. These proceedings shall be promptly instituted and determined. When a summary suspension as provided herein is ordered, a notice of the time, place and nature of the evidentiary hearing shall be attached to the order.

**7.55(3)** Petition. When a person desires to file a petition as provided in subrules 7.55(1) and 7.55(2), the petition to be filed shall contain a caption in the following form:

BEFORE THE DEPARTMENT OF REVENUE AND FINANCE  
HOOVER STATE OFFICE BUILDING  
DES MOINES, IOWA

IN THE MATTER OF _____ (state taxpayer's name and address and type of license).	}	PETITION DOCKET NO. _____ (filled in by Department)
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The petition shall substantially state in separate numbered paragraphs the following:

1. The full name and address of the petitioner;
2. Reference to the type of license and the relevant statutory authority;
3. Clear, concise and complete statements of all relevant facts showing why petitioner's license should not be revoked, refused, or denied;
4. Whether a similar license has previously been issued to or held by petitioner or revoked and if revoked the reasons therefor; and
5. The signature of the petitioner or petitioner's representative, the address of petitioner and of petitioner's representative, and the telephone number of petitioner or petitioner's representative.

**701—7.56(17A) Declaratory order—in general.** Any oral or written advice or opinion rendered to members of the public by department personnel not pursuant to a petition for declaratory order is not binding upon the department. However, department personnel, including field personnel, ordinarily will discuss substantive tax issues with members of the public or their representatives prior to the receipt of a petition for a declaratory order, but such oral or written opinions or advice are not binding on the department. This should not be construed as preventing members of the public or their representatives from inquiring whether the department will issue a declaratory order on a particular question. In these cases, however, the name of the taxpayer shall be disclosed. The department will also discuss questions relating to certain procedural matters as, for example, submitting a request for a declaratory order or submitting a petition to initiate rule-making procedures. Members of the public may, of course, seek oral technical assistance from a departmental employee in regard to the proper preparation of a return or report required to be filed with the department. Such oral advice is advisory only and the department is not bound to recognize it in the examination of the return, report or records.

**7.56(1)** Petition for declaratory order. Any person may file a petition with the Clerk of the Hearings Section for the Department of Revenue and Finance, Fourth Floor, Hoover State Office Building, Des Moines, Iowa 50319, seeking a declaratory order as to the applicability to specified circumstances of a statute, rule, or order within the primary jurisdic-

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tion of the department. A petition is deemed filed when it is received by the clerk of the hearings section for the department. The clerk of the hearings section for the department shall provide the petitioner with a file-stamped copy of the petition if the petitioner provides the clerk of the hearings section for the department an extra copy for this purpose. The petition must be typewritten or legibly handwritten in ink and must substantially conform to the following form:

DEPARTMENT OF REVENUE AND FINANCE

Petition by (Name of Petitioner) for a Declaratory Order on (Cite provisions of law involved).	}	PETITION FOR DECLARATORY ORDER Docket No. _____
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- The petition must provide the following information:
- a. A clear and concise statement of all relevant facts on which the order is requested;
  - b. A citation and the relevant language of the specific statutes, rules, policies, decisions, or orders, whose applicability is questioned, and any other relevant law;
  - c. The questions petitioner wants answered, stated clearly and concisely;
  - d. The answers to the questions desired by the petitioner and a summary of the reasons urged by the petitioner in support of those answers;
  - e. The reasons for requesting the declaratory order and disclosure of the petitioner's interest in the outcome;
  - f. A statement indicating whether the petitioner is currently a party to another proceeding involving the questions at issue and whether, to the petitioner's knowledge, those questions have been decided by, are pending determination by, or are under investigation by, any governmental entity;
  - g. The names and addresses of other persons, or a description of any class of persons, known by petitioner to be affected by, or interested in, the questions presented in the petition;
  - h. Any request by petitioner for a meeting provided for by this rule; and
  - i. Whether the petitioner is presently under audit by the department.

The petition must be dated and signed by the petitioner or the petitioner's representative. It must also include the name, mailing address, and telephone number of the petitioner and petitioner's representative, and a statement indicating the person to whom communications concerning the petition should be directed.

**7.56(2) Notice of petition.** Within 15 days after receipt of a petition for a declaratory order, the clerk of the hearings section for the department shall give notice of the petition to all persons not served by the petitioner to whom notice is required by any provision of law. The clerk of the hearings section for the department may also give notice to any other persons.

**7.56(3) Intervention.**

- a. Persons who qualify under any applicable provision of law as an intervenor and who file a petition for intervention within 20 days of the filing of a petition for declaratory order, shall be allowed to intervene in a proceeding for a declaratory order.
- b. Any person who files a petition for intervention at any time prior to the issuance of an order may be allowed to intervene in a proceeding for a declaratory order at the discretion of the department.

c. A petition for intervention shall be filed with the Clerk of the Hearings Section for the Department of Revenue and Finance, Fourth Floor, Hoover State Office Building, Des Moines, Iowa 50319. Such a petition is deemed filed when it is received by the clerk of the hearings section for the department. The clerk of the hearings section for the department will provide the petitioner with a file-stamped copy of the petition for intervention if the petitioner provides an extra copy for this purpose. A petition for intervention must be typewritten or legibly handwritten in ink and must substantially conform to the following form:

DEPARTMENT OF REVENUE AND FINANCE

Petition by (Name of Original Petitioner) for a Declaratory Order on (Cite provisions of law cited in original Petition).	}	PETITION FOR INTERVENTION Docket No. _____
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The petition for intervention must provide the following information:

- (1) Facts supporting the intervenor's standing and qualifications for intervention;
- (2) The answers urged by the intervenor to the question or questions presented and a summary of the reasons urged in support of those answers;
- (3) Reasons for requesting intervention and disclosure of the intervenor's interest in the outcome;
- (4) A statement indicating whether the intervenor is currently a party to any proceeding involving the questions at issue and whether, to the intervenor's knowledge, those questions have been decided by, are pending determination by, or are under investigation by, any governmental entity;
- (5) The names and addresses of any additional persons, or a description of any additional class of persons, known by the intervenor to be affected by, or interested in, the questions presented;
- (6) Whether the intervenor consents to be bound by the determination of the matters presented in the declaratory order proceeding;
- (7) Whether the intervenor is presently under audit by the department; and
- (8) Consent of the intervenor to be bound by the declaratory order.

The petition must be dated and signed by the intervenor or the intervenor's representative. It must also include the name, mailing address, and telephone number of the intervenor and intervenor's representative, and a statement indicating the person to whom communications should be directed.

For a petition for intervention to be allowed, the petitioner must have consented to be bound by the declaratory order and the petitioner must have standing regarding the issues raised in the petition for declaratory order. The petition for intervention must not correct or raise any additional facts that are in the petition for declaratory order. To have standing, the intervenor must have a legally protectible and tangible interest at stake in the petition for declaratory order under consideration by the director for which the party wishes to petition to intervene. Black's Law Dictionary, Centennial Edition, p. 1405, citing, *Guidry v. Roberts*, 331 So. 44, 50 (La.App.). Based on Iowa case law, the department may refuse to entertain a petition from one whose rights will not be invaded or infringed. *Bowers v. Bailey* 237 Iowa 295, 21 N.W.2d 773 (1946). The department may, by rule, impose a requirement of standing upon those that seek a declaratory

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order at least to the extent of requiring that they be potentially aggrieved or adversely affected by the department action or failure to act. Bonfield, "The Iowa Administrative Procedure Act, Background, Construction, Applicability and Public Access to Agency Law, The Rule-making Process," 60 Iowa Law Review 731, 805 (1975). The department adopts this requirement of standing for those seeking a petition for a declaratory order and those seeking to intervene in a petition for a declaratory order.

An association or a representative group is not considered to be an entity qualifying for filing a petition requesting a declaratory order on behalf of all of the association or group members. Each member of an association may not be similarly situated or represented by the factual scenario set forth in such a petition.

If a party seeks to have an issue determined by declaratory order, but the facts are different from a petition for declaratory order that is currently under consideration by the director, the interested party should not petition as an intervenor in the petition for declaratory order currently under the director's consideration. Instead, the party should file a separate petition for a declaratory order and the petition should include all of the relevant facts. The director may deny a petition for intervention without denying the underlying petition for declaratory order that is involved.

**7.56(4) Briefs.** The petitioner or any intervenor may file a brief in support of the position urged. The department may request a brief from the petitioner, any intervenor, or any other person concerning the questions raised in the petition.

**7.56(5) Inquiries.** Inquiries concerning the status of a declaratory order proceeding may be made to Administrator of the Compliance Division, Department of Revenue and Finance, Fourth Floor, Hoover State Office Building, Des Moines, Iowa 50319.

**7.56(6) Service and filing of petitions and other papers.**

a. When service required. Except where otherwise provided by law, every petition for declaratory order, petition for intervention, brief, or other paper filed in a proceeding for a declaratory order shall be served upon each of the parties of record to the proceeding, and on all other persons identified in the petition for declaratory order or petition for intervention as affected by or interested in the questions presented, simultaneously with their filing. The party filing a document is responsible for service on all parties and other affected or interested persons.

b. Filing—when required. All petitions for declaratory orders, petitions for intervention, briefs, or other papers in a proceeding for a declaratory order, shall be filed with Clerk of the Hearings Section for the Department of Revenue and Finance, Hoover State Office Building, Fourth Floor, Des Moines, Iowa 50319. All petitions, briefs, or other papers that are required to be served upon a party shall be filed simultaneously with the department.

c. Method of service, time of filing, and proof of mailing. Method of service, time of filing, and proof of mailing shall be as provided in 701—7.41(17A) and 701—7.53(17A).

**7.56(7) Department consideration.** Upon request by petitioner in the petition, the department may schedule a brief and informal meeting between the original petitioner, all intervenors, and the department, a member of the department, or a member of the staff of the department, to discuss the questions raised. The department may solicit comments or information from any person on the questions raised. Also, comments or information on the questions raised may be submitted to the department by any person.

**7.56(8) Action on petition.**

a. Within the time allowed by 1998 Iowa Acts, chapter 1202, section 13(5), after receipt of a petition for a declaratory order, the director shall take action on the petition as required by 1998 Iowa Acts, chapter 1202, section 13(5).

b. The date of issuance of an order or of a refusal to issue an order is as defined in 701—7.37(17A).

**7.56(9) Refusal to issue order.**

a. The department shall not issue a declaratory order where prohibited by 1998 Iowa Acts, chapter 1202, section 13(1), and may refuse to issue a declaratory order on some or all questions raised for the following reasons:

(1) The petition does not substantially comply with the required form;

(2) The petition does not contain facts sufficient to demonstrate that the petitioner will be aggrieved or adversely affected by the failure of the department to issue an order;

(3) The department does not have jurisdiction over the questions presented in the petition;

(4) The questions presented by the petition are also presented in a current rule making, contested case, or other department or judicial proceeding, that may definitively resolve them;

(5) The questions presented by the petition would more properly be resolved in a different type of proceeding or by another body with jurisdiction over the matter;

(6) The facts or questions presented in the petition are unclear, overbroad, insufficient, or otherwise inappropriate as a basis upon which to issue an order;

(7) There is no need to issue an order because the questions raised in the petition have been settled due to a change in circumstances;

(8) The petition is not based upon facts calculated to aid in the planning of future conduct but is, instead, based solely upon prior conduct, in an effort to establish the effect of that conduct or to challenge a department decision already made;

(9) The petition requests a declaratory order that would necessarily determine the legal rights, duties, or responsibilities of other persons who have not joined in the petition, intervened separately, or filed a similar petition and whose position on the questions presented may fairly be presumed to be adverse to that of petitioner;

(10) The petitioner requests the department to determine whether a statute is unconstitutional on its face; or

(11) The petition requests a declaratory order on an issue presently under investigation or audit or in rule-making proceedings or in litigation in a contested case or court proceedings.

b. A refusal to issue a declaratory order must indicate the specific grounds for the refusal and constitutes final agency action on the petition.

c. Refusal to issue a declaratory order pursuant to this provision does not preclude the filing of a new petition that seeks to eliminate the grounds for the department's refusal to issue an order.

**7.56(10) Contents of declaratory order—effective date.** In addition to the ruling order, a declaratory order must contain the date of its issuance, the name of petitioner and all intervenors, the specific statutes, rules, policies, decisions, or orders involved, the particular facts upon which it is based, and the reasons for its conclusion.

A declaratory order is effective on the date of issuance.

**7.56(11) Copies of orders.** A copy of all orders issued in response to a petition for a declaratory order shall be mailed promptly to the original petitioner and all intervenors.

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**7.56(12)** Effect of a declaratory order. A declaratory order has the same status and binding effect as a final order issued in a contested case proceeding. A declaratory order is binding on the department, the petitioner, and any intervenors. As to all other persons, a declaratory order serves only as precedent and is not binding on the department. The issuance of a declaratory order constitutes final department action on the petition.

**7.56(13)** Prejudice or no consent. The department will not issue a declaratory order that would substantially prejudice the rights of a person who would be a necessary party and who does not consent in writing to the determination of the matter by a declaratory order proceeding.

**701—7.57(17A) Department procedure for rule making.**

**7.57(1)** The department hereby adopts and incorporates by reference the following Uniform Rules on Agency Procedure for Rule Making, which are printed in the first volume of the Iowa Administrative Code, with the additions, changes, and deletions to those rules listed below:

X.2(17A) Advice on possible rules before notice of proposed rule adoption.

X.4(1) Notice of proposed rule making—contents.

X.4(3) Copies of notices. In addition to the text of this subrule, the department adds that the payment for the subscription and the subscription term is one year.

X.5(17A) Public participation. In addition to the text of this rule, the department also adds that written submissions should be submitted to the coadministrator of the Compliance Division, Department of Revenue and Finance, Hoover State Office Building, Fourth Floor, Des Moines, Iowa 50319. Also, any requests for special requirements concerning accessibility are to be made to the Clerk of the Hearings Section, Department of Revenue and Finance, Hoover State Office Building, Fourth Floor, Des Moines, Iowa 50319, telephone (515)281-7081;

X.6(17A) Regulatory analysis. In addition to the text of this rule, the department also adds that small businesses or organizations of small businesses may register on the department's small business impact list by making a written application to the Administrator of the Compliance Division, Department of Revenue and Finance, Hoover State Office Building, Fourth Floor, Des Moines, Iowa 50319;

X.7(17A,25B) Fiscal impact statement;

X.8(17A) Time and manner of rule adoption;

X.9(17A) Variance between adopted rule and published notice of proposed rule adoption; and

X.10(17A) Exemptions from public rule-making procedures. In addition to the text of this rule, the department also adds that exempt categories are generally limited to rules for nonsubstantive changes to a rule, such as rules for correcting grammar, spelling or punctuation in an existing or proposed rule.

X.11(17A) Concise statement of reasons. In addition to the text of this rule, the department also adds that a request for a concise statement of reasons for a rule must be submitted to the Administrator of the Compliance Division, Department of Revenue and Finance, Hoover State Office Building, Fourth Floor, Des Moines, Iowa 50319.

X.12(1) Contents, style and form of rule—contents;

X.12(4) Contents, style and form—style and form;

X.14(17A) Filing of rules;

X.15(17A) Effectiveness of rules prior to publication;

X.16(17A) General statement of policy; and

X.17(17A) Review by agency of rules.

**7.57(2)** The department hereby states that the following cited Uniform Rules on Agency Procedure for Rule Making are not adopted by the department:

X.1(17A) Applicability;

X.3(17A) Public rule-making docket;

X.4(2) Notice of proposed rule making—incorporated by reference;

X.12(2) Contents, style, and form of rule—incorporation by reference;

X.12(3) Contents, style and form of rule—references to materials not published in full; and

X.13(17A) Agency rule-making record.

**701—7.58(17A) Public inquiries on rule making and the rule-making records.** The department maintains records of information obtained and all actions taken and criticisms received regarding any rule within the past five years. The department also keeps a record of the status of every rule within the rule-making procedure. Inquiries concerning the status of rule making may be made by contacting the Administrator of the Compliance Division, Department of Revenue and Finance, Hoover State Office Building, Fourth Floor, Des Moines, Iowa 50319. For additional information regarding criticism of rules see 701—7.59(17A).

**701—7.59(17A) Criticism of rules.** The Administrator of the Compliance Division, Department of Revenue and Finance, Hoover State Office Building, Fourth Floor, Des Moines, Iowa 50319, is designated as the office where interested persons may submit by electronic means or by mail criticisms, requests for waivers, or comments regarding a rule. A criticism of a specific rule must be more than a mere lack of understanding of a rule or a dislike regarding the rule. To constitute a criticism of a rule, the criticism must be in writing, indicate it is a criticism of a specific rule, and have a valid legal basis for support. All requests for waivers, comments, or criticisms received on any rule will be kept in a separate record for a period of five years by the department.

ITEM 3. Amend 701—10.117(422,453B), 701—10.118(422,453B), 701—10.119(422,453B), introductory paragraph, 701—10.120(422,453B) to 701—10.123(422,453B), and 701—10.126(422,453B) as follows:

**701—10.117(422,453B) Procedure for posting bond.** In the event a taxpayer seeks to post a bond in lieu of summary collection of a jeopardy assessment, pending final determination of the amount of tax legally due, an original and four copies of a separate written bond application conspicuously titled "Jeopardy Assessment Bond Request" must be filed with the ~~department's administrative law judge clerk of the hearings section for the department.~~ Thereafter, if the taxpayer and the department agree on an appropriate bond, the ~~administrative law judge clerk of the hearings section for the department~~ shall be notified and the bond shall be approved by the ~~administrative law judge clerk of the hearings section for the department.~~

If the ~~administrative law judge clerk of the hearings section for the department~~ has not been notified that an agreement on the bond has been reached within ten days after the date upon which the bond request was filed, the ~~administrative law judge clerk of the hearings section for the department~~ shall transfer the file to the director who shall promptly schedule a hearing on the bond request with written notice to be given the taxpayer and the department at least ten days prior to the hearing.

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This rule is intended to implement *Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202, and Iowa Code sections 422.30 and 453B.9.*

**701—10.118(422,453B) Time limits.** Bond requests may be made any time after a timely protest to the jeopardy assessment has been filed with the ~~department clerk of the hearings section for the department~~, except that any bond request whereby the taxpayer seeks to postpone a scheduled sale of assets seized by or on behalf of the department must be filed with the ~~administrative law judge clerk of the hearings section for the department~~ no later than ten days from the date on which notice of the sale was mailed to, or otherwise served upon, the taxpayer. Portions of an assessment which are undisputed must be paid in full at the time a bond request is filed.

This rule is intended to implement *Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202, and Iowa Code sections 422.30 and 453B.9.*

**701—10.119(422,453B) Amount of bond.** In the event no agreement on the bond is reached, bonds must be posted in an amount to be determined by the ~~administrative law judge director~~ consistent with the following:

This rule is intended to implement *Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202, and sections 422.30 and 453B.9.*

**701—10.120(422,453B) Payment Posting of bond.** If the taxpayer fails to post the bond as agreed upon within 15 days from the date the bond is approved by the ~~administrative law judge clerk of the hearings section for the department~~, no bond will be allowed and the ~~administrative law judge director~~ shall dismiss the bond request. If no agreement was reached and a ~~proposed~~ bond order is issued by the ~~administrative law judge director~~, the taxpayer has ten days to either ~~appeal the administrative law judge's proposed bond order to the director or to pay post the bond.~~ If no timely appeal is taken, the ~~proposed order becomes the final agency action on the bond request.~~ *the bond is not posted within the 10-day period, the director shall dismiss the bond request.*

This rule is intended to implement *Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202, and sections 422.30 and 453B.9.*

**701—10.121(422,453B) Proposed order Order.** The ~~administrative law judge's director's~~ proposed order shall be in writing and shall include findings of fact based solely on the evidence in the record and on matters officially noticed in the record and shall include conclusions of law. The findings of fact and conclusions of law shall be separately stated. Findings of fact shall be prefaced by a concise and explicit statement of underlying facts supporting the findings. Each conclusion of law shall be supported by cited authority or by a reasoned opinion.

Orders will be issued within a reasonable time after termination of the hearing. Parties shall be promptly notified of each order by delivery to them of a copy of the order by personal service or by ordinary mail.

This rule is intended to implement *Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202, and sections 422.30 and 453B.9.*

**701—10.122(422,453B) Appeal to director.** ~~On an appeal from the administrative law judge's order, the director has all the power which the director would initially have had in making the bonding decision. However, the director will consider only those issues or selected issues which were presented at the hearing before the administrative law judge. The parties~~

~~will be notified of the issues which will be considered by the director.~~

~~A cross-appeal may be taken within the ten-day period for taking an appeal to the director of revenue and finance or in any event within five days after the appeal to the director is taken.~~

~~The director's order issued pursuant to an appeal constitutes the final order of the department for purposes of judicial review. Parties shall be promptly notified of the director's order by delivery to them of a copy of the order by personal service or by ordinary mail. Director's order. The director's order constitutes the final order of the department for purposes of judicial review. Parties shall be promptly notified of the director's order by delivery to them of a copy of the order by personal service or by ordinary mail.~~

This rule is intended to implement *Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202, and sections 422.30 and 453B.9.*

**701—10.123(422,453B) Type of bond.** The bond shall be payable to the department for the use of the state of Iowa and shall be conditioned upon the full payment of the tax, penalty, interest, or fees that are found to be due which remain unpaid upon the resolution of the contested case proceedings up to the amount of the bond. Upon application of the taxpayer or the department, the ~~department's administrative law judge director~~ may, upon hearing, fix a greater or lesser amount to reflect changed circumstances, but only after ten days' prior notice is given to the department or the taxpayer as the case may be.

A personal bond, without a surety, is only permitted if the taxpayer posts with the ~~department's administrative law judge clerk of the hearings section for the department~~, cash, a cashier's check, a certificate of deposit, or other marketable securities which are approved by the director with a readily ascertainable value which is equal in value to the total amount of the bond required. If a surety bond is posted, the surety on the bond may be either personal or corporate. The provisions of Iowa Code chapter 636 relating to personal and corporate sureties shall govern to the extent not inconsistent with the provisions of this subrule.

This rule is intended to implement *Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202, and sections 422.30 and 453B.9.*

**701—10.126(422,453B) Exoneration of the bond.** Upon conclusion of the contested case administrative proceedings, the bond shall be exonerated by the ~~administrative law judge director~~ when any of the following events occur: upon full payment of the tax, penalty, interest, costs or fees found to be due; upon filing a bond for the purposes of judicial review which bond is sufficient to secure the unpaid tax penalty, interest, costs and fees; or if no additional tax, penalty, interest, costs or fees are found to be due that have not been previously paid, upon entry of a final unappealable order which resolves the underlying protest.

This rule is intended to implement *Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202, and sections 422.30 and 453B.9.*

## ARC 8785A

REVENUE AND FINANCE  
DEPARTMENT[701]

## Notice of Intended Action

Twenty-five interested persons, a governmental subdivision, an agency or association of 25 or more persons may demand an oral presentation hereon as provided in Iowa Code section 17A.4(1)"b."

Notice is also given to the public that the Administrative Rules Review Committee may, on its own motion or on written request by any individual or group, review this proposed action under section 17A.8(6) at a regular or special meeting where the public or interested persons may be heard.

Pursuant to the authority of Iowa Code section 421.17 and Iowa Code chapter 28E, the Department of Revenue and Finance hereby gives Notice of Intended Action to amend Chapter 150, "Offset of Debts Owed State Agencies," Iowa Administrative Code.

This amendment adopts a new heading and new rules to implement Iowa Code section 421.17 [1998 Iowa Acts, Senate File 2235, sections 4 to 6]. This new law provides that effective April 17, 1998, offsets performed by the Department for clerks of the Iowa District Courts require the Department to send written notice of the offset before it is performed to the person liable for the judicial liability. The Department will then perform the offset and after the offset is performed by the Department, the Department must send written notice to the person liable for the liability owing to any and all clerks of the Iowa District Court. Pursuant to this new provision, the state agency retains the responsibility to provide procedures for the person liable to contest the amount owed to the clerk of the District Court. However, under this new law, the Department must provide the procedure and remedies available for contesting the validity of the offset.

The proposed amendment will not necessitate additional expenditures by political subdivisions or agencies and entities which contract with political subdivisions.

The Department has determined that this proposed amendment may have an impact on small business. The Department has considered the factors listed in Iowa Code section 17A.31(4). The Department will issue a regulatory flexibility analysis as provided in Iowa Code sections 17A.31 to 17A.33 if a written request is filed by delivery or by mailing postmarked no later than April 13, 1999, to the Policy Section, Compliance Division, Department of Revenue and Finance, Hoover State Office Building, P.O. Box 10457, Des Moines, Iowa 50306. The request may be made by the Administrative Rules Review Committee, the Governor, a political subdivision, at least 25 persons who qualify as a small business under Iowa Code sections 17A.31 to 17A.33, or an organization of small businesses representing at least 25 persons which is registered with this agency under Iowa Code sections 17A.31 to 17A.33.

Any interested person may make written suggestions or comments on this proposed amendment on or before April 23, 1999. Such written comments should be directed to the Policy Section, Compliance Division, Department of Revenue and Finance, Hoover State Office Building, P.O. Box 10457, Des Moines, Iowa 50306.

Persons who want to orally convey their views should contact the Policy Section, Compliance Division, Department of Revenue and Finance, at (515)281-4250 or at the Department of Revenue and Finance offices on the fourth floor of the Hoover State Office Building.

Requests for a public hearing must be received by April 16, 1999.

This amendment is intended to implement Iowa Code section 421.17.

The following amendment is proposed.

Amend 701—Chapter 150 by adopting a **new** heading and rules as follows:

## JUDICIAL OFFSET PROCEDURES BEGINNING APRIL 17, 1998

**701—150.10(421) Incorporation by reference.** In providing judicial offset procedures beginning April 17, 1998, the department incorporates by reference the following rules and subrules to be applied to the substance and procedure under this heading:

1. 701—150.2(421) Scope and purpose.
2. 701—150.3(421) Participation guidelines.
3. 701—subrule 150.4(1) Duties of the agency—Notification to the department.
4. 701—subrule 150.4(2) Duties of the agency—Change in status of debt.
5. 701—subrule 150.4(3) Duties of the agency—Semiannual certification of file.
6. 701—150.5(421) Duties of the department—Performance of the offset.
7. 701—150.7(421) Payments of offset amounts.
8. 701—150.8(421) Reimbursement for offsetting liabilities.
9. 701—150.9(421) Confidentiality of information.

**701—150.11(421) Definitions.** The definitions set forth in 701—150.1(421) are incorporated by reference and are applicable to rules 701—150.10(421) to 150.16(421) except the definitions of "liability" or "debt" and "offset" which shall be defined for the purpose of these rules as follows:

"Liability" or "debt" means any liquidated sum due and owing to any clerk of the Iowa district court which has accrued through, but not limited to, fines, judgments, court costs, or any legal theory regardless of whether there is an outstanding judgment for that sum. Before setoff, the amount of a person's original liability to a state agency must be at least \$50, unless otherwise provided as based on the discretion of the department.

"Offset" shall mean to set off or compensate any clerk of the Iowa district court which has a legal claim against a person or entity where there exists a person's valid claim on a state agency that is in the form of a liquidated sum due, owing and payable. Before setoff, the amount of a person's claim on a state agency shall be at least the minimum amount as indicated in the definition of "liability" or "debt" as set forth in this rule. If the source of a person's claim is a tax refund or tax rebate, the minimum will be \$25.

**701—150.12(421) Applicability and procedure.** For liabilities accrued and owing on or after April 17, 1998, to any and all clerks of the Iowa district court, the department shall issue a written notice informing any person liable for the liability owed to any and all clerks of the Iowa district court that an offset will be performed. The department will perform the offsets for such clerks as provided in Iowa Code section 421.17(29) and the department will send a written notice to the person liable for such a liability prior to and after the offset has been performed. Subsequently, the department will also provide administrative procedures and available remedies for contesting the validity of such an offset. The Iowa district court will provide the procedures and remedies for challenging the underlying liability at issue. This rule ap-

## REVENUE AND FINANCE DEPARTMENT[701](cont'd)

plies only to liabilities and debts owed to the clerks of the Iowa district court.

**701—150.13(421) Notice of offset.** The department shall send written notification of the offset to the person liable for a liability owed to any and all clerks of the Iowa district court within 10 calendar days from the date the department is notified by the judicial branch of the uncollected liability. This notification must include:

1. The judicial branch's right to the payment in question;
2. The judicial branch's right to recover the payment through this offset procedure;
3. The basis of the judicial branch's case in regard to the debt;
4. The right of the person who owes the liability to request, within 15 days of the mailing of the notice, that the payment between parties be split when the payment in question is jointly owned or otherwise owned by two or more persons;
5. The right of the person liable to contest the right of offset and the validity of such offset with the department by mailing, to the clerk of the hearings section for the department, a protest within 15 days of the mailing of such notice and that the procedure to follow in that appeal will conform, according to the context, to the rules of the department involving protests and contested case proceedings in 701—Chapter 7 of the department's rules of practice and procedure;
6. The agency or division and the telephone number for the person liable for the liability to contact concerning questions regarding the validity of the offset and the procedures for the offset;
7. That the person liable for the liability has the opportunity to contest the validity and amount of the liability by mailing, within 15 days of mailing of the notice of offset, a written application to contest the liability to the appropriate clerk of the Iowa district court; and
8. The clerk of the district court and the telephone number for the person liable for the liability to contact concerning questions relating to the validity of the underlying liability and regarding the validity of the amount owed.

**701—150.14(421) Procedure for contesting.** A person liable for a liability under this subheading may contest the validity or amount of the underlying liability by mailing written notification to the appropriate clerk of the Iowa district court of the person's intent to contest such a liability. The Iowa district court will provide the person liable with the procedure and remedies for contesting the validity and amount of the underlying liability.

A person liable for a liability payable to the judicial branch that has been deemed qualified for offset may contest the validity of the offset or the right of the offset by mailing written notification to the Department of Revenue and Finance, Clerk of Hearings Section, Hoover State Office Building, Fourth Floor, Des Moines, Iowa 50319. The department will provide the procedure and remedies for contesting the validity of the offset and right of offset pursuant to the applicable contested case rules set forth in 701—Chapter 7.

If a person liable to the judicial department gives written notice of intent to contest either the validity or the amount of the liability or the validity of the offset or right of offset, the judicial department and the department will hold a payment in abeyance until the final disposition of the contested liability or offset.

**701—150.15(421) Postoffset notification and procedure.** Following the offset, the department will notify the person liable that the offset was performed. It is the responsibility of the department to make payment to the person liable to the Iowa district court clerk of any amount to which the Iowa district court clerk is not entitled to receive under the offset, in accordance with established procedures.

**701—150.16(421) Report of satisfaction of obligations.** At least monthly, the department will file with the clerk of the district court a notice of satisfaction of each obligation to the full extent of all moneys collected in satisfaction of the obligation. No additional or separate written notice from the department regarding the performed offsets is required.

These rules are intended to implement Iowa Code sections 421.16, 421.17, 422.20 and 422.72.

## ARC 8842A

## SECRETARY OF STATE[721]

## Notice of Intended Action

Twenty-five interested persons, a governmental subdivision, an agency or association of 25 or more persons may demand an oral presentation hereon as provided in Iowa Code section 17A.4(1)"b."

Notice is also given to the public that the Administrative Rules Review Committee may, on its own motion or on written request by any individual or group, review this proposed action under section 17A.8(6) at a regular or special meeting where the public or interested persons may be heard.

Pursuant to the authority of Iowa Code sections 9.1 and 17A.3, the Secretary of State gives Notice of Intended Action to adopt Chapter 7, "Agency Procedure for Rule Making," Chapter 8, "Petitions for Rule Making," and Chapter 9, "Declaratory Orders," Iowa Administrative Code.

The adoption of Chapters 7, 8, and 9 is intended to bring the agency into compliance with the amendments to the Iowa Administrative Procedure Act made by 1998 Iowa Acts, chapter 1202, with regard to rule-making procedures and declaratory orders. This rule making does not address potential amendments to agency contested case procedures; additional review of agency practice is necessary to determine what amendments to agency procedures will be required, if any.

Proposed Chapters 7 and 9 adopt the Uniform Rules on Rule Making and Declaratory Orders as published in the February 24, 1999, Iowa Administrative Bulletin. The Uniform Rules are customized to make generic references to "the agency" or "the office" to the Secretary or the Secretary's Office as appropriate. The most substantive modifications to the Uniform Rules are in proposed rule 7.3(17A) and in 7.5(3)"d." In proposed rule 7.3(17A), the agency is omitting the extrastatutory language regarding an anticipated rule-making docket, retaining the pending rule-making docket, in order to best allocate agency resources. In 7.5(3)"d," regarding the conduct of an oral hearing on proposed rules, the rule as noticed requires, rather than encourages, persons who wish to make an oral presentation at a public hearing on a rule to notify the agency at least one business day prior to the proceeding. Proposed Chapter 8 adopts the Uniform Rules on Petitions for Rule Making appearing in the first volume of the Iowa Administrative Code.

Any interested person may make written suggestions or comments on these proposed rules through April 13, 1999. Such written suggestions or comments should be directed to Dean Lerner, Deputy Secretary of State, Second Floor, Hoover State Office Building, Des Moines, Iowa 50319.

## SECRETARY OF STATE[721](cont'd)

Persons who want to orally convey their views should contact the Secretary of State's Office at (515)281-5865, or at the Secretary's offices on the second floor of the Hoover State Office Building. Requests for a public hearing must be received by April 13, 1999.

These proposed rules are intended to implement Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202, and Iowa Code section 9.1.

The following rules are proposed.

ITEM 1. Adopt the following **new** chapter:

## CHAPTER 7

## AGENCY PROCEDURE FOR RULE MAKING

**721—7.1(17A) Applicability.** Except to the extent otherwise expressly provided by statute, all rules adopted by the agency are subject to the provisions of Iowa Code chapter 17A, the Iowa administrative procedure Act, and the provisions of this chapter.

**721—7.2(17A) Advice on possible rules before notice of proposed rule adoption.** In addition to seeking information by other methods, the agency may, before publication of a Notice of Intended Action under Iowa Code section 17A.4(1)"a," solicit comments from the public on a subject matter of possible rule making by the agency by causing notice to be published in the Iowa Administrative Bulletin of the subject matter and indicating where, when, and how persons may comment.

**721—7.3(17A) Public rule-making docket.** The agency shall maintain a current public rule-making docket. The rule-making docket shall list each pending rule-making proceeding. A rule-making proceeding is pending from the time it is commenced, by publication in the Iowa Administrative Bulletin of a Notice of Intended Action pursuant to Iowa Code section 17A.4(1)"a," to the time it is terminated by publication of a Notice of Termination in the Iowa Administrative Bulletin or the rule becoming effective. For each rule-making proceeding, the docket shall indicate:

1. The subject matter of the proposed rule;
2. A citation to all published notices relating to the proceeding;
3. Where written submissions on the proposed rule may be inspected;
4. The time during which written submissions may be made;
5. The names of persons who have made written requests for an opportunity to make oral presentations on the proposed rule, where those requests may be inspected, and where and when oral presentations may be made;
6. Whether a written request for the issuance of a regulatory analysis, or a concise statement of reasons, has been filed, whether such an analysis or statement or a fiscal impact statement has been issued, and where any such written request, analysis, or statement may be inspected;
7. The current status of the proposed rule and any agency determinations with respect thereto;
8. Any known timetable for agency decisions or other action in the proceeding;
9. The date of the rule's adoption;
10. The date of the rule's filing, indexing, and publication;
11. The date on which the rule will become effective; and
12. Where the rule-making record may be inspected.

**721—7.4(17A) Notice of proposed rule making.**

**7.4(1) Contents.** At least 35 days before the adoption of a rule, the agency shall cause Notice of Intended Action to be published in the Iowa Administrative Bulletin. The Notice of Intended Action shall include:

- a. A brief explanation of the purpose of the proposed rule;
- b. The specific legal authority for the proposed rule;
- c. Except to the extent impracticable, the text of the proposed rule;
- d. Where, when, and how persons may present their views on the proposed rule; and
- e. Where, when, and how persons may demand an oral proceeding on the proposed rule if the notice does not already provide for one.

Where inclusion of the complete text of a proposed rule in the Notice of Intended Action is impracticable, the agency shall include in the notice a statement fully describing the specific subject matter of the omitted portion of the text of the proposed rule, the specific issues to be addressed by that omitted text of the proposed rule, and the range of possible choices being considered by the agency for the resolution of each of those issues.

**7.4(2) Incorporation by reference.** A proposed rule may incorporate other materials by reference only if it complies with all of the requirements applicable to the incorporation by reference of other materials in an adopted rule that are contained in subrule 7.12(2) of this chapter.

**7.4(3) Copies of notices.** Persons desiring to receive copies of future Notices of Intended Action by subscription must file with the agency a written request indicating the name and address to which such notices should be sent. Within seven days after submission of a Notice of Intended Action to the administrative rules coordinator for publication in the Iowa Administrative Bulletin, the agency shall mail or electronically transmit a copy of that notice to subscribers who have filed a written request for either mailing or electronic transmittal with the agency for Notices of Intended Action. The written request shall be accompanied by payment of the subscription price which may cover the full cost of the subscription service, including its administrative overhead and the cost of copying and mailing the Notices of Intended Action for a period of one year.

**721—7.5(17A) Public participation.**

**7.5(1) Written comments.** For at least 20 days after publication of the Notice of Intended Action, persons may submit argument, data, and views, in writing, on the proposed rule. Such written submissions should identify the proposed rule to which they relate and should be submitted to the Chief Deputy Secretary of State, Second Floor, Hoover State Office Building, Des Moines, Iowa 50319, or the person designated in the Notice of Intended Action.

**7.5(2) Oral proceedings.** The agency may, at any time, schedule an oral proceeding on a proposed rule. The agency shall schedule an oral proceeding on a proposed rule if, within 20 days after the published Notice of Intended Action, a written request for an opportunity to make oral presentations is submitted to the agency by the administrative rules review committee, a governmental subdivision, an agency, an association having not less than 25 members, or at least 25 persons. That request must also contain the following additional information:

1. A request by one or more individual persons must be signed by each of them and include the address and telephone number of each of them.
2. A request by an association must be signed by an officer or designee of the association and must contain a state-

## SECRETARY OF STATE[721](cont'd)

ment that the association has at least 25 members and the address and telephone number of the person signing that request.

3. A request by an agency or governmental subdivision must be signed by an official having authority to act on behalf of the entity and must contain the address and telephone number of the person signing that request.

**7.5(3) Conduct of oral proceedings.**

a. **Applicability.** This subrule applies only to those oral rule-making proceedings in which an opportunity to make oral presentations is authorized or required by Iowa Code section 17A.4(1)"b" as amended by 1998 Iowa Acts, chapter 1202, section 8, or this chapter.

b. **Scheduling and notice.** An oral proceeding on a proposed rule may be held in one or more locations and shall not be held earlier than 20 days after notice of its location and time is published in the Iowa Administrative Bulletin. That notice shall also identify the proposed rule by ARC number and citation to the Iowa Administrative Bulletin.

c. **Presiding officer.** The secretary, a member of the secretary's staff, or another person designated by the secretary who will be familiar with the substance of the proposed rule, shall preside at the oral proceeding on a proposed rule. If the secretary does not preside, the presiding officer shall prepare a memorandum for consideration by the secretary summarizing the contents of the presentations made at the oral proceeding unless the secretary determines that such a memorandum is unnecessary because the secretary will personally listen to or read the entire transcript of the oral proceeding.

d. **Conduct of proceeding.** At an oral proceeding on a proposed rule, persons may make oral statements and make documentary and physical submissions, which may include data, views, comments or arguments concerning the proposed rule. Persons wishing to make oral presentations at such a proceeding are required to notify the agency at least one business day prior to the proceeding and indicate the general subject of their presentations. At the proceeding, those who participate shall indicate their names and addresses, identify any persons or organizations they may represent, and provide any other information relating to their participation deemed appropriate by the presiding officer. Oral proceedings shall be open to the public and shall be recorded by stenographic or electronic means.

(1) At the beginning of the oral proceeding, the presiding officer shall give a brief synopsis of the proposed rule, a statement of the statutory authority for the proposed rule, and the reasons for the agency decision to propose the rule. The presiding officer may place time limitations on individual oral presentations when necessary to ensure the orderly and expeditious conduct of the oral proceeding. To encourage joint oral presentations and to avoid repetition, additional time may be provided for persons whose presentations represent the views of other individuals as well as their own views.

(2) Persons making oral presentations are encouraged to avoid restating matters which have already been submitted in writing.

(3) To facilitate the exchange of information, the presiding officer may, where time permits, open the floor to questions or general discussion.

(4) The presiding officer shall have the authority to take any reasonable action necessary for the orderly conduct of the meeting.

(5) Physical and documentary submissions presented by participants in the oral proceeding shall be submitted to the

presiding officer. Such submissions become the property of the agency.

(6) The oral proceeding may be continued by the presiding officer to a later time without notice other than by announcement at the hearing.

(7) Participants in an oral proceeding shall not be required to take an oath or to submit to cross-examination. However, the presiding officer in an oral proceeding may question participants and may permit the questioning of participants by other participants about any matter relating to that rule-making proceeding, including any prior written submissions made by those participants in that proceeding; but no participant shall be required to answer any question.

(8) The presiding officer in an oral proceeding may permit rebuttal statements and request the filing of written statements subsequent to the adjournment of the oral presentations.

**7.5(4) Additional information.** In addition to receiving written comments and oral presentations on a proposed rule according to the provisions of this rule, the agency may obtain information concerning a proposed rule through any other lawful means deemed appropriate under the circumstances.

**7.5(5) Accessibility.** The agency shall schedule oral proceedings in rooms accessible to and functional for persons with physical disabilities. Persons who have special requirements should contact the secretary of state's office at (515)281-5865 in advance to arrange access or other needed services.

**721—7.6(17A) Regulatory analysis.**

**7.6(1) Definition of small business.** A "small business" is defined in 1998 Iowa Acts, chapter 1202, section 10(7).

**7.6(2) Mailing list.** Small businesses or organizations of small businesses may be registered on the agency's small business impact list by making a written application addressed to the Chief Deputy Secretary of State, Second Floor, Hoover State Office Building, Des Moines, Iowa 50319. The application for registration shall state:

a. The name of the small business or organization of small businesses;

b. Its address;

c. The name of a person authorized to transact business for the applicant;

d. A description of the applicant's business or organization. An organization representing 25 or more persons who qualify as a small business shall indicate that fact.

e. Whether the registrant desires copies of Notices of Intended Action at cost, or desires advance notice of the subject of all or some specific category of proposed rule making affecting small business.

The agency may at any time request additional information from the applicant to determine whether the applicant is qualified as a small business or as an organization of 25 or more small businesses. The agency may periodically send a letter to each registered small business or organization of small businesses asking whether that business or organization wishes to remain on the registration list. The name of a small business or organization of small businesses will be removed from the list if a negative response is received, or if no response is received within 30 days after the letter is sent.

**7.6(3) Time of mailing.** Within seven days after submission of a Notice of Intended Action to the administrative rules coordinator for publication in the Iowa Administrative Bulletin, the agency shall mail to all registered small businesses or organizations of small businesses, in accordance with their request, either a copy of the Notice of Intended Ac-

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tion or notice of the subject of that proposed rule making. In the case of a rule that may have an impact on small business adopted in reliance upon Iowa Code section 17A.4(2), the agency shall mail notice of the adopted rule to registered businesses or organizations prior to the time the adopted rule is published in the Iowa Administrative Bulletin.

**7.6(4)** Qualified requesters for regulatory analysis—economic impact. The agency shall issue a regulatory analysis of a proposed rule that conforms to the requirements of 1998 Iowa Acts, chapter 1202, section 10(2a), after a proper request from:

- a. The administrative rules coordinator;
- b. The administrative rules review committee.

**7.6(5)** Qualified requesters for regulatory analysis—business impact. The agency shall issue a regulatory analysis of a proposed rule that conforms to the requirements of 1998 Iowa Acts, chapter 1202, section 10(2b), after a proper request from:

- a. The administrative rules review committee;
- b. The administrative rules coordinator;
- c. At least 25 or more persons who sign the request provided that each represents a different small business;
- d. An organization representing at least 25 small businesses. That organization shall list the name, address and telephone number of not less than 25 small businesses it represents.

**7.6(6)** Time period for analysis. Upon receipt of a timely request for a regulatory analysis, the agency shall adhere to the time lines described in 1998 Iowa Acts, chapter 1202, section 10(4).

**7.6(7)** Contents of request. A request for a regulatory analysis is made when it is mailed or delivered to the agency. The request shall be in writing and satisfy the requirements of 1998 Iowa Acts, chapter 1202, section 10(1).

**7.6(8)** Contents of concise summary. The contents of the concise summary shall conform to the requirements of 1998 Iowa Acts, chapter 1202, section 10(4,5).

**7.6(9)** Publication of a concise summary. The agency shall make available, to the maximum extent feasible, copies of the published summary in conformance with 1998 Iowa Acts, chapter 1202, section 10(5).

**7.6(10)** Regulatory analysis contents—rules review committee or rules coordinator. When a regulatory analysis is issued in response to a written request from the administrative rules review committee, or the administrative rules coordinator, the regulatory analysis shall conform to the requirements of 1998 Iowa Acts, chapter 1202, section 10(2a), unless a written request expressly waives one or more of the items listed in the section.

**7.6(11)** Regulatory analysis contents—substantial impact on small business. When a regulatory analysis is issued in response to a written request from the administrative rules review committee, the administrative rules coordinator, at least 25 persons signing that request who each qualify as a small business, or by an organization representing at least 25 small businesses, the regulatory analysis shall conform to the requirements of 1998 Iowa Acts, chapter 1202, section 10(2b).

**721—7.7(17A,25B) Fiscal impact statement.**

**7.7(1)** A proposed rule that mandates additional combined expenditures exceeding \$100,000 by all affected political subdivisions or agencies and entities which contract with political subdivisions to provide services must be accompanied by a fiscal impact statement outlining the costs associated with the rule. A fiscal impact statement must satisfy the requirements of Iowa Code section 25B.6.

**7.7(2)** If the agency determines at the time it adopts a rule that the fiscal impact statement upon which the rule is based contains errors, the agency shall, at the same time, issue a corrected fiscal impact statement and publish the corrected fiscal impact statement in the Iowa Administrative Bulletin.

**721—7.8(17A) Time and manner of rule adoption.**

**7.8(1)** Time of adoption. The agency shall not adopt a rule until the period for making written submissions and oral presentations has expired. Within 180 days after the later of the publication of the Notice of Intended Action, or the end of oral proceedings thereon, the agency shall adopt a rule pursuant to the rule-making proceeding or terminate the proceeding by publication of a notice to that effect in the Iowa Administrative Bulletin.

**7.8(2)** Consideration of public comment. Before the adoption of a rule, the agency shall consider fully all of the written submissions and oral submissions received in that rule-making proceeding or any memorandum summarizing such oral submissions, and any regulatory analysis or fiscal impact statement issued in that rule-making proceeding.

**7.8(3)** Reliance on agency expertise. Except as otherwise provided by law, the agency may use its own experience, technical competence, specialized knowledge, and judgment in the adoption of a rule.

**721—7.9(17A) Variance between adopted rule and published notice of proposed rule adoption.**

**7.9(1)** The agency shall not adopt a rule that differs from the rule proposed in the Notice of Intended Action on which the rule is based unless:

- a. The differences are within the scope of the subject matter announced in the Notice of Intended Action and are in character with the issues raised in that notice; and
- b. The differences are a logical outgrowth of the contents of that Notice of Intended Action and the comments submitted in response thereto; and
- c. The Notice of Intended Action provided fair warning that the outcome of that rule-making proceeding could be the rule in question.

**7.9(2)** In determining whether the Notice of Intended Action provided fair warning that the outcome of that rule-making proceeding could be the rule in question, the agency shall consider the following factors:

- a. The extent to which persons who will be affected by the rule should have understood that the rule-making proceeding on which it is based could affect their interests;
- b. The extent to which the subject matter of the rule or the issues determined by the rule are different from the subject matter or issues contained in the Notice of Intended Action; and
- c. The extent to which the effects of the rule differ from the effects of the proposed rule contained in the Notice of Intended Action.

**7.9(3)** The agency shall commence a rule-making proceeding within 60 days of its receipt of a petition for rule making seeking the amendment or repeal of a rule that differs from the proposed rule contained in the Notice of Intended Action upon which the rule is based, unless the agency finds that the differences between the adopted rule and the proposed rule are so insubstantial as to make such a rule-making proceeding wholly unnecessary. A copy of any such finding and the petition to which it responds shall be sent to petitioner, the administrative rules coordinator, and the administrative rules review committee, within three days of its issuance.

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**7.9(4) Concurrent rule-making proceedings.** Nothing in this rule disturbs the discretion of the agency to initiate, concurrently, several different rule-making proceedings on the same subject with several different published Notices of Intended Action.

**721—7.10(17A) Exemptions from public rule-making procedures.**

**7.10(1) Omission of notice and comment.** To the extent the agency for good cause finds that public notice and participation are unnecessary, impracticable, or contrary to the public interest in the process of adopting a particular rule, the agency may adopt that rule without publishing advance Notice of Intended Action in the Iowa Administrative Bulletin and without providing for written or oral public submissions prior to its adoption. The agency shall incorporate the required finding and a brief statement of its supporting reasons in each rule adopted in reliance upon this subrule.

**7.10(2) Public proceedings on rules adopted without notice and comment.** The agency may, at any time, commence a standard rule-making proceeding for the adoption of a rule that is identical or similar to a rule it adopts in reliance upon subrule 7.10(1). Upon written petition by a governmental subdivision, the administrative rules review committee, an agency, the administrative rules coordinator, an association having not less than 25 members, or at least 25 persons, the agency shall commence a standard rule-making proceeding for any rule specified in the petition that was adopted in reliance upon subrule 7.10(1). Such a petition must be filed within one year of the publication of the specified rule in the Iowa Administrative Bulletin as an adopted rule. The rule-making proceeding on that rule must be commenced within 60 days of the receipt of such a petition. After a standard rule-making proceeding commenced pursuant to this subrule, the agency may either readopt the rule it adopted without benefit of all usual procedures on the basis of subrule 7.10(1), or may take any other lawful action, including the amendment or repeal of the rule in question, with whatever further proceedings are appropriate.

**721—7.11(17A) Concise statement of reasons.**

**7.11(1) General.** When requested by a person, either prior to the adoption of a rule or within 30 days after its publication in the Iowa Administrative Bulletin as an adopted rule, the agency shall issue a concise statement of reasons for the rule. Requests for such a statement must be in writing and be delivered to the Chief Deputy Secretary of State, Second Floor, Hoover State Office Building, Des Moines, Iowa 50319. The request should indicate whether the statement is sought for all or only a specified part of the rule. Requests will be considered made on the date received.

**7.11(2) Contents.** The concise statement of reasons shall contain:

- a. The reasons for adopting the rule;
- b. An indication of any change between the text of the proposed rule contained in the published Notice of Intended Action and the text of the rule as finally adopted, with the reasons for any such change;
- c. The principal reasons urged in the rule-making proceeding for and against the rule, and the agency's reasons for overruling the arguments made against the rule.

**7.11(3) Time of issuance.** After a proper request, the agency shall issue a concise statement of reasons by the later of the time the rule is adopted or 35 days after receipt of the request.

**721—7.12(17A) Contents, style, and form of rule.**

**7.12(1) Contents.** Each rule adopted by the agency shall contain the text of the rule and, in addition:

- a. The date the agency adopted the rule;
- b. A brief explanation of the principal reasons for the rule-making action if such reasons are required by 1998 Iowa Acts, chapter 1202, section 8, or the agency in its discretion decides to include such reasons;
- c. A reference to all rules repealed, amended, or suspended by the rule;
- d. A reference to the specific statutory or other authority authorizing adoption of the rule;
- e. Any findings required by any provision of law as a prerequisite to adoption or effectiveness of the rule;
- f. A brief explanation of the principal reasons for the failure to provide for waivers to the rule if no waiver provision is included and a brief explanation of any waiver or special exceptions provided in the rule if such reasons are required by 1998 Iowa Acts, chapter 1202, section 8, or the agency in its discretion decides to include such reasons; and
- g. The effective date of the rule.

**7.12(2) Incorporation by reference.** The agency may incorporate by reference in a proposed or adopted rule, and without causing publication of the incorporated matter in full, all or any part of a code, standard, rule, or other matter if the agency finds that the incorporation of its text in the agency proposed or adopted rule would be unduly cumbersome, expensive, or otherwise inexpedient. The reference in the agency proposed or adopted rule shall fully and precisely identify the incorporated matter by location, title, citation, date, and edition, if any; shall briefly indicate the precise subject and the general contents of the incorporated matter; and shall state that the proposed or adopted rule does not include any later amendments or editions of the incorporated matter. The agency may incorporate such matter by reference in a proposed or adopted rule only if the agency makes copies of it readily available to the public. The rule shall state how and where copies of the incorporated matter may be obtained at cost from this agency, and how and where copies may be obtained from the agency of the United States, this state, another state, or the organization, association, or persons, originally issuing that matter. The agency shall retain permanently a copy of any materials incorporated by reference in a rule of the agency.

If the agency adopts standards by reference to another publication, it shall provide a copy of the publication containing the standards to the administrative rules coordinator for deposit in the state law library and may make the standards available electronically.

**7.12(3) References to materials not published in full.** When the administrative code editor decides to omit the full text of a proposed or adopted rule because publication of the full text would be unduly cumbersome, expensive, or otherwise inexpedient, the agency shall prepare and submit to the administrative code editor for inclusion in the Iowa Administrative Bulletin and Iowa Administrative Code a summary statement describing the specific subject matter of the omitted material. This summary statement shall include the title and a brief description sufficient to inform the public of the specific nature and subject matter of the proposed or adopted rules, and of significant issues involved in these rules. The summary statement shall also describe how a copy of the full text of the proposed or adopted rule, including any unpublished matter and any matter incorporated by reference, may be obtained from the agency. The agency will provide a copy of that full text at actual cost upon request and shall make copies of the full text available for re-

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view at the state law library and may make the standards available electronically.

At the request of the administrative code editor, the agency shall provide a proposed statement explaining why publication of the full text would be unduly cumbersome, expensive, or otherwise inexpedient.

**7.12(4) Style and form.** In preparing its rules, the agency shall follow the uniform numbering system, form, and style prescribed by the administrative rules coordinator.

**721—7.13(17A) Agency rule-making record.**

**7.13(1) Requirement.** The agency shall maintain an official rule-making record for each rule it proposes by publication in the Iowa Administrative Bulletin of a Notice of Intended Action, or adopts. The rule-making record and materials incorporated by reference must be available for public inspection.

**7.13(2) Contents.** The agency rule-making record shall contain:

a. Copies of all publications in the Iowa Administrative Bulletin with respect to the rule or the proceeding upon which the rule is based and any file-stamped copies of agency submissions to the administrative rules coordinator concerning that rule or the proceeding upon which it is based;

b. Copies of any portions of the agency's public rule-making docket containing entries relating to the rule or the proceeding upon which the rule is based;

c. All written petitions, requests, and submissions received by the agency, and all other written materials of a factual nature as distinguished from opinion that are relevant to the merits of the rule and that were created or compiled by the agency and considered by the secretary, in connection with the formulation, proposal, or adoption of the rule or the proceeding upon which the rule is based, except to the extent the agency is authorized by law to keep them confidential; provided, however, that when any such materials are deleted because they are authorized by law to be kept confidential, the agency shall identify in the record the particular materials deleted and state the reasons for that deletion;

d. Any official transcript of oral presentations made in the proceeding upon which the rule is based or, if not transcribed, the stenographic record or electronic recording of those presentations, and any memorandum prepared by a presiding officer summarizing the contents of those presentations;

e. A copy of any regulatory analysis or fiscal impact statement prepared for the proceeding upon which the rule is based;

f. A copy of the rule and any concise statement of reasons prepared for that rule;

g. All petitions for amendment, repeal or suspension of the rule;

h. A copy of any objection to the issuance of that rule without public notice and participation that was filed pursuant to Iowa Code section 17A.4(2) by the administrative rules review committee, the governor, or the attorney general;

i. A copy of any objection to the rule filed by the administrative rules review committee, the governor, or the attorney general pursuant to Iowa Code section 17A.4(4), and any agency response to that objection;

j. A copy of any significant written criticism of the rule, including a summary of any petitions for waiver of the rule; and

k. A copy of any executive order concerning the rule.

**7.13(3) Effect of record.** Except as otherwise required by a provision of law, the agency rule-making record required by this rule need not constitute the exclusive basis for agency action on that rule.

**7.13(4) Maintenance of record.** The agency shall maintain the rule-making record for a period of not less than five years from the later of the date the rule to which it pertains became effective, the date of the Notice of Intended Action, or the date of any written criticism as described in 7.13(2) "g," "h," "i," or "j."

**721—7.14(17A) Filing of rules.** The agency shall file each rule it adopts in the office of the administrative rules coordinator. The filing must be executed as soon after adoption of the rule as is practicable. At the time of filing, each rule must have attached to it any fiscal impact statement and any concise statement of reasons that was issued with respect to that rule. If a fiscal impact statement or statement of reasons for that rule was not issued until a time subsequent to the filing of that rule, the note or statement must be attached to the filed rule within five working days after the note or statement is issued. In filing a rule, the agency shall use the standard form prescribed by the administrative rules coordinator.

**721—7.15(17A) Effectiveness of rules prior to publication.**

**7.15(1) Grounds.** The agency may make a rule effective after its filing at any stated time prior to 35 days after its indexing and publication in the Iowa Administrative Bulletin if it finds that a statute so provides, the rule confers a benefit or removes a restriction on some segment of the public, or that the effective date of the rule is necessary to avoid imminent peril to the public health, safety, or welfare. The agency shall incorporate the required finding and a brief statement of its supporting reasons in each rule adopted in reliance upon this subrule.

**7.15(2) Special notice.** When the agency makes a rule effective prior to its indexing and publication in reliance upon the provisions of Iowa Code section 17A.5(2)"b"(3), the agency shall employ all reasonable efforts to make its contents known to the persons who may be affected by that rule prior to the rule's indexing and publication. The term "all reasonable efforts" requires the agency to employ the most effective and prompt means of notice rationally calculated to inform potentially affected parties of the effectiveness of the rule that is justified and practical under the circumstances considering the various alternatives available for this purpose, the comparative costs to the agency of utilizing each of those alternatives, and the harm suffered by affected persons from any lack of notice concerning the contents of the rule prior to its indexing and publication. The means that may be used for providing notice of such rules prior to their indexing and publication include, but are not limited to, any one or more of the following means: radio, newspaper, television, signs, mail, telephone, personal notice or electronic means.

A rule made effective prior to its indexing and publication in reliance upon the provisions of Iowa Code section 17A.5(2)"b"(3) shall include in that rule a statement describing the reasonable efforts that will be used to comply with the requirements of subrule 7.15(2).

**721—7.16(17A) General statements of policy.**

**7.16(1) Compilation, indexing, public inspection.** The agency shall maintain an official, current, and dated compilation that is indexed by subject, containing all of its general statements of policy within the scope of Iowa Code section 17A.2(10)"a," "c," "f," "g," "h," "k." Each addition to, change in, or deletion from the official compilation must also

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be dated, indexed, and a record thereof kept. Except for those portions containing rules governed by Iowa Code section 17A.2(7)"f," or otherwise authorized by law to be kept confidential, the compilation must be made available for public inspection and copying.

**7.16(2) Enforcement of requirements.** A general statement of policy subject to the requirements of this subsection shall not be relied on by the agency to the detriment of any person who does not have actual, timely knowledge of the contents of the statement until the requirements of subrule 7.16(1) are satisfied. This provision is inapplicable to the extent necessary to avoid imminent peril to the public health, safety, or welfare.

**721—7.17(17A) Review by agency of rules.**

**7.17(1)** Any interested person, association, agency, or political subdivision may submit a written request to the administrative rules coordinator requesting the agency to conduct a formal review of a specified rule. Upon approval of that request by the administrative rules coordinator, the agency shall conduct a formal review of a specified rule to determine whether a new rule should be adopted instead or the rule should be amended or repealed. The agency may refuse to conduct a review if it has conducted such a review of the specified rule within five years prior to the filing of the written request.

**7.17(2)** In conducting the formal review, the agency shall prepare within a reasonable time a written report summarizing its findings, its supporting reasons, and any proposed course of action. The report must include a concise statement of the agency's findings regarding the rule's effectiveness in achieving its objectives, including a summary of any available supporting data. The report shall also concisely describe significant written criticisms of the rule received during the previous five years, including a summary of any petitions for waiver of the rule received by the agency or granted by the agency. The report shall describe alternative solutions to resolve the criticisms of the rule, the reasons any were rejected, and any changes made in the rule in response to the criticisms as well as the reasons for the changes. A copy of the agency's report shall be sent to the administrative rules review committee and the administrative rules coordinator. The report must also be available for public inspection.

These rules are intended to implement Iowa Code sections 17A.3, 17A.4, and 17A.5 and 1998 Iowa Acts, chapter 1202.

ITEM 2. Adopt the following new chapter:

CHAPTER 8  
PETITIONS FOR RULE MAKING

**721—8.1(17A) Petition for rule making.** Any person or agency may file a petition for rule making with the secretary of state at the Secretary of State's Office, First Floor, State Capitol Building, Des Moines, Iowa 50319, or the Secretary of State's Office, Second Floor, Hoover State Office Building, Des Moines, Iowa 50319. A petition is deemed filed when it is received in either office. The agency must provide the petitioner with a file-stamped copy of the petition if the petitioner provides the agency an extra copy for this purpose. The petition must be typewritten or legibly handwritten in ink and must substantially conform to the following form:

## SECRETARY OF STATE

Petition by (Name of Petitioner) for the (adoption, amendment, or repeal) of rules relating to (state subject matter).	}	PETITION FOR RULE MAKING
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The petition must provide the following information:

1. A statement of the specific rule-making action sought by the petitioner including the text or a summary of the contents of the proposed rule or amendment to a rule and, if it is a petition to amend or repeal a rule, a citation to the particular portion or portions of the rule proposed to be amended or repealed, together with a quotation of the relevant language.

2. A citation to any law deemed relevant to the agency's authority to take the action urged or to the desirability of that action.

3. A brief summary of petitioner's arguments in support of the action urged in the petition.

4. A brief summary of any data supporting the action urged in the petition.

5. The names and addresses of other persons, or a description of any class of persons, known by petitioner to be affected by, or interested in, the proposed action which is the subject of the petition.

6. Any request by petitioner for a meeting provided for by rule 721—8.4(17A).

**8.1(1)** The petition must be dated and signed by the petitioner or the petitioner's representative. It must also include the name, mailing address, and telephone number of the petitioner and petitioner's representative (if one is involved), and a statement indicating the person to whom communications concerning the petition should be directed.

**8.1(2)** The agency may deny a petition because it does not substantially conform to the required form.

**721—8.2(17A) Briefs.** The petitioner may attach a brief to the petition in support of the action urged in the petition. The agency may request a brief from the petitioner or from any other person concerning the substance of the petition.

**721—8.3(17A) Inquiries.** Inquiries concerning the status of a petition for rule-making may be made to the Chief Deputy Secretary of State, Second Floor, Hoover State Office Building, Des Moines, Iowa 50319.

**721—8.4(17A) Agency consideration.**

**8.4(1)** Within 30 days after the filing of a petition, the agency must submit a copy of the petition and any accompanying brief to the administrative rules coordinator and to the administrative rules review committee. Upon request by petitioner in the petition, the agency must schedule a brief and informal meeting between the petitioner and the agency, a member of the agency, or a member of the staff of the agency, to discuss the petition. The agency may request the petitioner to submit additional information or argument concerning the petition. The agency may also solicit comments from any person on the substance of the petition. Also, comments on the substance of the petition may be submitted to the agency by any person.

**8.4(2)** Within 90 days after the filing of the petition, or within any longer period agreed to by the petitioner, the agency must, in writing, deny the petition, and notify petitioner of its action and the specific grounds for the denial, or grant the petition and notify petitioner that it has instituted rule-making proceedings on the subject of the petition. Petitioner shall be deemed notified of the denial or grant of the

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petition on the date when the agency mails or delivers the required notification to petitioner.

8.4(3) Denial of a petition because it does not substantially conform to the required form does not preclude the filing of a new petition on the same subject that seeks to eliminate the grounds for the agency's rejection of the petition.

These rules are intended to implement Iowa Code section 17A.7 as amended by 1998 Iowa Acts, chapter 1202.

ITEM 3. Adopt the following new chapter:

CHAPTER 9  
DECLARATORY ORDERS

721—9.1(17A) **Petition for declaratory order.** Any person may file a petition with the secretary of state for a declaratory order as to the applicability to specified circumstances of a statute, rule, or order within the primary jurisdiction of the secretary at the Secretary of State's Office, First Floor, State Capitol Building, Des Moines, Iowa 50319, or the Secretary of State's Office, Second Floor, Hoover State Office Building, Des Moines, Iowa 50319. A petition is deemed filed when it is received in either office. The secretary of state's office shall provide the petitioner with a file-stamped copy of the petition if the petitioner provides the agency an extra copy for this purpose. The petition must be typewritten or legibly handwritten in ink and must substantially conform to the following form:

SECRETARY OF STATE

Petition by (Name of Petitioner) for a Declaratory Order on (Cite provisions of law involved).	}	PETITION FOR DECLARATORY ORDER
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- The petition must provide the following information:
1. A clear and concise statement of all relevant facts on which the order is requested.
  2. A citation and the relevant language of the specific statutes, rules, policies, decisions, or orders, whose applicability is questioned, and any other relevant law.
  3. The questions petitioner wants answered, stated clearly and concisely.
  4. The answers to the questions desired by the petitioner and a summary of the reasons urged by the petitioner in support of those answers.
  5. The reasons for requesting the declaratory order and disclosure of the petitioner's interest in the outcome.
  6. A statement indicating whether the petitioner is currently a party to another proceeding involving the questions at issue and whether, to the petitioner's knowledge, those questions have been decided by, are pending determination by, or are under investigation by, any governmental entity.
  7. The names and addresses of other persons, or a description of any class of persons, known by petitioner to be affected by, or interested in, the questions presented in the petition.
  8. Any request by petitioner for a meeting provided for by 9.7(17A).
- The petition must be dated and signed by the petitioner or the petitioner's representative. It must also include the name, mailing address, and telephone number of the petitioner and petitioner's representative and a statement indicating the person to whom communications concerning the petition should be directed.

721—9.2(17A) **Notice of petition.** Within 15 days after receipt of a petition for a declaratory order, the secretary of state's office shall give notice of the petition to all persons not served by the petitioner pursuant to 9.6(17A) to whom notice is required by any provision of law. The office may also give notice to any other persons.

721—9.3(17A) **Intervention.**

9.3(1) Persons who qualify under any applicable provision of law as an intervenor and who file a petition for intervention within 20 days of the filing of a petition for declaratory order shall be allowed to intervene in a proceeding for a declaratory order.

9.3(2) Any person who files a petition for intervention at any time prior to the issuance of an order may be allowed to intervene in a proceeding for a declaratory order at the discretion of the secretary or the secretary's designee.

9.3(3) A petition for intervention shall be filed at the Secretary of State's Office, First Floor, State Capitol Building, Des Moines, Iowa 50319, or the Secretary of State's Office, Second Floor, Hoover State Office Building, Des Moines, Iowa 50319. A petition is deemed filed when it is received in either office. The office will provide the petitioner with a file-stamped copy of the petition for intervention if the petitioner provides an extra copy for this purpose. A petition for intervention must be typewritten or legibly handwritten in ink and must substantially conform to the following form:

SECRETARY OF STATE

Petition by (Name of Original Petitioner) for a Declaratory Order on (Cite provisions of law cited in original petition).	}	PETITION FOR INTERVENTION
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- The petition for intervention must provide the following information:
1. Facts supporting the intervenor's standing and qualifications for intervention.
  2. The answers urged by the intervenor to the question or questions presented and a summary of the reasons urged in support of those answers.
  3. Reasons for requesting intervention and disclosure of the intervenor's interest in the outcome.
  4. A statement indicating whether the intervenor is currently a party to any proceeding involving the questions at issue and whether, to the intervenor's knowledge, those questions have been decided by, are pending determination by, or are under investigation by, any governmental entity.
  5. The names and addresses of any additional persons, or a description of any additional class of persons, known by the intervenor to be affected by, or interested in, the questions presented.
  6. Whether the intervenor consents to be bound by the determination of the matters presented in the declaratory order proceeding.
- The petition must be dated and signed by the intervenor or the intervenor's representative. It must also include the name, mailing address, and telephone number of the intervenor and intervenor's representative, and a statement indicating the person to whom communications should be directed.
- 721—9.4(17A) **Briefs.** The petitioner or any intervenor may file a brief in support of the position urged. The secretary of state's office may request a brief from the petitioner, any intervenor, or any other person concerning the questions raised.

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**721—9.5(17A) Inquiries.** Inquiries concerning the status of a declaratory order proceeding may be made to the Chief Deputy of State, Second Floor, Hoover State Office Building, Des Moines, Iowa 50319.

**721—9.6(17A) Service and filing of petitions and other papers.**

**9.6(1)** When service required. Except where otherwise provided by law, every petition for declaratory order, petition for intervention, brief, or other paper filed in a proceeding for a declaratory order shall be served upon each of the parties of record to the proceeding, and on all other persons identified in the petition for declaratory order or petition for intervention as affected by or interested in the questions presented, simultaneously with their filing. The party filing a document is responsible for service on all parties and other affected or interested persons.

**9.6(2)** Filing—when required. All petitions for declaratory orders, petitions for intervention, briefs, or other papers in a proceeding for a declaratory order shall be filed with the Secretary of State's Office, First Floor, State Capitol Building, Des Moines, Iowa 50319, or the Secretary of State's Office, Second Floor, Hoover State Office Building, Des Moines, Iowa 50319. All petitions, briefs, or other papers that are required to be served upon a party shall be filed simultaneously with the secretary.

**9.6(3)** Method of service, time of filing, and proof of mailing. Service upon a party represented by an attorney shall be made upon the attorney unless otherwise ordered. Service is made by delivery or by mailing a copy to the person's last-known address. Service by mail is complete upon mailing, except where otherwise specifically provided by statute, rule, or order. Except where otherwise provided by law, a document is deemed filed at the time it is delivered to the secretary of state's office, delivered to an established courier service for immediate delivery to that office, or mailed by first-class mail or state interoffice mail to that office, so long as there is proof of mailing. Proof of mailing includes either a legible United States Postal Service postmark on the envelope, a certificate of service, a notarized affidavit, or a certification in substantially the following form:

I certify under penalty of perjury and pursuant to the laws of Iowa that, on (date of mailing), I mailed copies of (describe document) addressed to the (agency office and address) and to the names and addresses of the parties listed below by depositing the same in (a United States post office mailbox with correct postage properly affixed or state interoffice mail).

(Date)

(Signature)

**721—9.7(17A) Consideration.** Upon request by petitioner, the secretary of state's office must schedule a brief and informal meeting between the original petitioner, all intervenors, and the secretary or a member of the secretary's staff to discuss the questions raised. The secretary of state's office may solicit comments from any person on the questions raised. Also, comments on the questions raised may be submitted to the secretary by any person.

**721—9.8(17A) Action on petition.**

**9.8(1)** Within the time allowed by 1998 Iowa Acts, chapter 1202, section 13(5), after receipt of a petition for a declaratory order, the secretary or designee shall take action on the petition as required by 1998 Iowa Acts, chapter 1202, section 13(5).

**9.8(2)** The date of issuance of an order or of a refusal to issue an order means the date of mailing of the order or date

of delivery if service is by other means unless another date is specified in the order.

**721—9.9(17A) Refusal to issue order.**

**9.9(1)** The secretary shall not issue a declaratory order where prohibited by 1998 Iowa Acts, chapter 1202, section 13(1), and may refuse to issue a declaratory order on some or all questions raised for the following reasons:

1. The petition does not substantially comply with the required form.

2. The petition does not contain facts sufficient to demonstrate that the petitioner will be aggrieved or adversely affected by the failure of the secretary to issue an order.

3. The secretary does not have jurisdiction over the questions presented in the petition.

4. The questions presented by the petition are also presented in a current rule making, contested case, or other agency or judicial proceeding, that may definitively resolve them.

5. The questions presented by the petition would more properly be resolved in a different type of proceeding or by another body with jurisdiction over the matter.

6. The facts or questions presented in the petition are unclear, overbroad, insufficient, or otherwise inappropriate as a basis upon which to issue an order.

7. There is no need to issue an order because the questions raised in the petition have been settled due to a change in circumstances.

8. The petition is not based upon facts calculated to aid in the planning of future conduct but is, instead, based solely upon prior conduct in an effort to establish the effect of that conduct or to challenge an agency decision already made.

9. The petition requests a declaratory order that would necessarily determine the legal rights, duties, or responsibilities of other persons who have not joined in the petition, intervened separately, or filed a similar petition and whose position on the questions presented may fairly be presumed to be adverse to that of petitioner.

10. The petitioner requests the secretary to determine whether a statute is unconstitutional on its face.

**9.9(2)** A refusal to issue a declaratory order must indicate the specific grounds for the refusal and constitutes final agency action on the petition.

**9.9(3)** Refusal to issue a declaratory order pursuant to this provision does not preclude the filing of a new petition that seeks to eliminate the grounds for the refusal to issue an order.

**721—9.10(17A) Contents of declaratory order—effective date.** In addition to the order itself, a declaratory order must contain the date of its issuance, the name of petitioner and all intervenors, the specific statutes, rules, policies, decisions, or orders involved, the particular facts upon which it is based, and the reasons for its conclusion.

A declaratory order is effective on the date of issuance.

**721—9.11(17A) Copies of orders.** A copy of all orders issued in response to a petition for a declaratory order shall be mailed promptly to the original petitioner and all intervenors.

**721—9.12(17A) Effect of a declaratory order.** A declaratory order has the same status and binding effect as a final order issued in a contested case proceeding. It is binding on the secretary of state's office, the petitioner, and any intervenors who consent to be bound and is applicable only in circumstances where the relevant facts and the law involved are indistinguishable from those on which the order was based. As to all other persons, a declaratory ruling serves only as prece-

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dent and is not binding on the secretary. The issuance of a declaratory order constitutes final agency action on the petition.

These rules are intended to implement Iowa Code section 17A.9 as amended by 1998 Iowa Acts, chapter 1202.

## ARC 8843A

### SECRETARY OF STATE[721]

#### Notice of Intended Action

Twenty-five interested persons, a governmental subdivision, an agency or association of 25 or more persons may demand an oral presentation hereon as provided in Iowa Code section 17A.4(1)"b."

Notice is also given to the public that the Administrative Rules Review Committee may, on its own motion or on written request by any individual or group, review this proposed action under section 17A.8(6) at a regular or special meeting where the public or interested persons may be heard.

Pursuant to the authority of Iowa Code section 17A.3(1)"b," the Iowa Secretary of State hereby gives Notice of Intended Action to amend Chapter 21, "Election Forms and Instructions," Iowa Administrative Code.

The purpose of the proposed amendment is to provide voters and other interested persons with the opportunity to review the summaries to be printed on the ballot for the proposed constitutional amendment to be voted upon at a special election to be held June 29, 1999. Since the only purpose of this Notice is to solicit public comments, following the comment period the Notice will be terminated without adopting the amendment.

These summaries are submitted pursuant to subrule 21.200(3). Paragraph "a" of this rule requires the Iowa Secretary of State as Commissioner of Elections to file these summaries with the Administrative Rules Coordinator for publication in the Iowa Administrative Bulletin "[n]ot less than 150 days prior to the election...". On February 8, 1999, the General Assembly took legislative action and set the date of the special election for June 29, 1999. This action made it impossible for the Secretary of State's office to comply with the 150-day rule.

This rule, which carries the force of law, requires 150 days between the submission of the summaries for publication and the date of the election. Several requests were made to the General Assembly to resolve this conflict. The Commissioner requested the legislature to resolve this "150-day dilemma" by constitutional action or, more appropriately, by postponing the date of the election to allow full compliance with subrule 21.200(3). These requests were denied.

As a result, the Secretary of State is now unable to fully comply with subrule 21.200(3). Left with no choice, the Commissioner's only alternative is to comply with the remaining provisions to the fullest extent possible. The Secretary of State submits these summaries noting serious concerns about the inability to adhere to the 150-day rule.

Any interested person may make written suggestions or comments on the proposed amendment on or before Tuesday, April 13, 1999. Written comments should be sent to the Director of Elections, Office of the Secretary of State, Second Floor, Hoover State Office Building, Des Moines, Iowa 50319-0138, fax (515)242-5953. Anyone who wishes to comment orally may telephone the Elections Division at (515)281-5823 or visit the office on the second floor of the Hoover Building.

There will be a public hearing on Tuesday, April 13, 1999, at 1:30 p.m. at the office of the Secretary of State, Second Floor, Hoover State Office Building. Persons may comment orally or in writing. Persons who speak at the hearing will be

asked to give their names and addresses for the record and to confine their remarks to the subject of the amendment. Persons planning to attend the hearing shall notify the Director of Elections by telephone at (515) 281-5823 or by fax at (515)242-5953 no later than 4:30 p.m. on Monday, April 12, 1999.

This rule is intended to implement Iowa Code section 49.44.

The following amendment is proposed.

Amend rule 721—21.200(49) by adding the following new subrule:

**21.200(5)** Two proposed constitutional amendments were passed by the Seventy-seventh General Assembly as Senate Joint Resolution 2004, and by the Seventy-eighth General Assembly as Senate Joint Resolution 1. This proposed amendment will be voted upon at the special election to be held on June 29, 1999.

The summaries proposed by the secretary of state appear below:

1

Summary: This amendment adds to the Constitution a new article requiring the Governor to prepare a budget, and the general assembly to appropriate, only 99 percent of any money that is available to appropriate. The amount of money the legislature may appropriate equals any leftover money, minus any refunds the state has to pay, plus the amount of money that a committee estimates to be available.

If a new method of raising money is proposed, the general assembly may appropriate 95 percent of the estimated amount of new money that will be available. Any money left over which is greater than 10 percent of all the money appropriated for that year will be applied to the amount of money available to spend in the next year. Any leftover money which is 10 percent or less of the appropriated money may be applied to the next year's estimate if three-fifths (60 percent) of the general assembly approves.

2

Summary: This amendment adds a new article to the Constitution which requires three-fifths (60 percent) of all the votes in the House and the Senate to enact, amend, repeal, or approve any legislation resulting in an increase in state revenues. The definition of increase is left to the legislature to define. The three-fifths (60 percent) vote requirement does not apply to income taxes or sales and use taxes imposed at the option of local government. If only 50 percent of the members of the House and Senate enact, amend, repeal, or approve an increase in revenue, and nobody objects to this within one year, then the increase is valid.

## ARC 8815A

### SOIL CONSERVATION DIVISION[27]

#### Notice of Intended Action

Twenty-five interested persons, a governmental subdivision, an agency or association of 25 or more persons may demand an oral presentation hereon as provided in Iowa Code section 17A.4(1)"b."

Notice is also given to the public that the Administrative Rules Review Committee may, on its own motion or on written request by any individual or group, review this proposed action under section 17A.8(6) at a regular or special meeting where the public or interested persons may be heard.

Pursuant to the authority of Iowa Code section 161A.4(1), the Division of Soil Conservation gives Notice of Intended

## SOIL CONSERVATION DIVISION[27](cont'd)

Action to adopt Chapter 3, "Contested Case Practice and Procedure," Chapter 4, "Declaratory Rulings," and Chapter 5, "Agency Procedure for Rule Making," Iowa Administrative Code.

These proposed amendments implement 1998 Iowa Acts, chapter 1202, relating to revisions to the Iowa Administrative Procedure Act. These proposed rules establish new rules for the Division of Soil Conservation on agency rule making, declaratory rules, and the handling of contested cases. The proposed chapters adopt by reference the uniform rules drafted by the Attorney General's office with a few modifications specific to the Division.

Any interested person may make written suggestions or comments on the following proposed rules prior to 4:30 p.m. on April 13, 1999. Such written material should be directed to Kenneth Tow, Chief, Mines and Minerals Bureau, Division of Soil Conservation, Wallace State Office Building, East Ninth and Grand, Des Moines, Iowa 50319. Comments may also be faxed to (515)281-6170.

A public hearing to receive public comments will be held on Tuesday, April 13, 1999, at 10 a.m. in the First Floor Conference Room, East Half, Wallace State Office Building, East Ninth and Grand, Des Moines, Iowa.

These proposed rules are intended to implement Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202, and chapter 161A.

ITEM 1. Adopt a new Chapter 3 as follows:

## CHAPTER 3

## CONTESTED CASE PROCEEDINGS AND PRACTICE

The uniform rules on contested case proceedings published in the February 24, 1999, Iowa Administrative Bulletin are adopted by reference with the following amendments:

**27—3.1(17A,161A) Scope and applicability.** In lieu of the words "(agency name)" insert "the Division of Soil Conservation, Department of Agriculture and Land Stewardship".

**27—3.2(17A,161A) Definitions.** Insert the following definitions in alphabetical order:

"Committee" means the state soil conservation committee established at Iowa Code section 161A.4.

"Department" means the department of agriculture and land stewardship.

"Director" means the director of the division of soil conservation, department of agriculture and land stewardship.

"Division" means the division of soil conservation, department of agriculture and land stewardship.

"Secretary" means the Iowa secretary of agriculture.

In lieu of the words "(designate official)" insert "person designated by the director to preside over a contested case including, but not limited to, an administrative law judge with the department of inspections and appeals". In lieu of the words "(agency name)" insert "the division of soil conservation, department of agriculture and land stewardship".

**27—3.3(17A,161A) Time requirements.**

3.3(2) Delete the words "or by (specify rule number)".

**27—3.4(17A,161A) Requests for contested case proceeding.** In lieu of the first paragraph, insert "Any person claiming an entitlement to a contested case proceeding shall file a written request for such a proceeding within the time specified by the particular rules or statutes governing the subject matter or, in the absence of such law, the time specified in the agency action in question. If no time is specified in the

agency action and there is no applicable rule or statute, then the written request for a contested case proceeding shall be filed in writing within 30 calendar days of the action or notice of the intended action the person wishes to contest."

**27—3.5(17A,161A) Notice of hearing.**

3.5(1) Delete paragraph "e. (other options)."

**27—3.6(17A,161A) Presiding officer.**

3.6(1) Delete the words "(or such other time period the agency designates)".

3.6(2) Delete the words "(or its designee)". Delete paragraphs "c" and "i" and reletter the subsequent paragraphs.

3.6(3) Delete the subrule and insert "The agency shall issue a written ruling specifying the grounds for its decision within 20 days after a request for an administrative law judge is filed."

3.6(4) Delete the subrule and renumber the subsequent subrules.

**27—3.12(17A,161A) Service and filing of pleadings and other papers.**

3.12(3) In lieu of the words "(specify office and address)" insert "Director's Office, Division of Soil Conservation, Department of Agriculture and Land Stewardship, Wallace State Office Building, East Ninth and Grand, Des Moines, Iowa 50319". In lieu of the words "(agency name)" insert "division".

3.12(4) In lieu of the words "(designate office)" insert "director's office".

**27—3.15(17A,161A) Motions.**

3.15(4) Delete the words "(or other time period designated by the agency)".

3.15(5) In lieu of the words "(45 days)" insert "45 days". In lieu of the words "(15 days)" insert "15 days". In lieu of the words "(20 days)" insert "20 days".

**27—3.16(17A,161A) Prehearing conference.**

3.16(1) Delete the words "(or other time period designated by the agency)". In lieu of the words "(designate office)" insert "presiding officer".

**27—3.17(17A,161A) Continuances.**

3.17(1) Delete the words "(or other time period designated by the agency)".

**27—3.22(17A,161A) Default.**

3.22(5) Delete the words "(or other time specified by the agency)".

**27—3.23(17A,161A) Ex parte communication.**

3.23(8) In lieu of the words "(or disclosed)" insert "or disclosed".

3.23(10) In lieu of the words "(agency to designate person to whom violations should be reported)" insert "the division director or the director's designee".

**27—3.24(17A,161A) Recording costs.** In lieu of the words "(agency name)" insert "division".

**27—3.25(17A,161A) Interlocutory appeals.** In lieu of the words "(board, commission, director)" insert "director or the director's designee". In lieu of the words "(of the presiding officer)" insert "of the presiding officer". Delete the words "(or other time period designated by the agency)".

**27—3.26(17A,161A) Final decision.**

3.26(1) In lieu of the words "(the agency) (or a quorum of the agency)" insert "the division".

## SOIL CONSERVATION DIVISION[27](cont'd)

**3.26(2)** In lieu of the words "(agency name)" insert "division".

**27—3.27(17A,161A) Appeals and review.**

**3.27(1)** In lieu of the words "(board, commission, director)" insert "director or the director's designee". Delete the words "(or other time period designated by the agency)".

**3.27(2)** In lieu of the words "(board, commission, director)" insert "director or the director's designee". Delete the words "(or other time period designated by the agency)".

**3.27(3)** In lieu of the words "(agency name)" insert "division".

**3.27(4)** Delete the words "(or other time period designated by the agency)". In lieu of the words "(board, commission, director)" insert "director or the director's designee".

**3.27(5)** In lieu of the words "(agency name)" insert "division".

**3.27(6)** Delete the words "(or other time period designated by the agency)". In lieu of the words "(board, commission, director)" insert "director or the director's designee".

**27—3.28(17A,161A) Applications for rehearing.**

**3.28(3)** In lieu of the words "(agency name)" insert "division".

**3.28(4)** In lieu of the words "(agency name)" insert "division".

**27—3.29(17A,161A) Stays of agency action.**

**3.29(1)** In lieu of the words "(agency name)" insert "division". In lieu of the words "(board, commission, director)" insert "director or the director's designee".

**3.29(2)** In lieu of the words "(board, commission, director, as appropriate)" insert "director or the director's designee".

**3.29(3)** In lieu of the words "(agency name)" insert "division".

ITEM 2. Adopt a new Chapter 4 as follows:

CHAPTER 4  
DECLARATORY ORDERS

The uniform rules on declaratory orders published in the February 24, 1999, Iowa Administrative Bulletin are adopted by reference with the following amendments:

**27—4.1(17A,161A) Petition for declaratory order.** In lieu of the words "(designate agency)" the first time the words are used, insert "division of soil conservation, department of agriculture and land stewardship (hereinafter referred to as "the division")". In lieu of the words "(designate agency)" the subsequent times the words are used, insert "division". In lieu of the words "(designate office)" insert "Wallace State Office Building, East Ninth and Grand, Des Moines, Iowa 50319." In lieu of the words "(AGENCY NAME)" insert "DIVISION OF SOIL CONSERVATION, DEPARTMENT OF AGRICULTURE AND LAND STEWARDSHIP".

**27—4.2(17A,161A) Notice of petition.** In lieu of the words "\_\_\_ days (15 or less)" insert "15 days". In lieu of the words "(designate agency)" insert "division".

**27—4.3(17A,161A) Intervention.**

**4.3(1)** In lieu of the words "\_\_\_ days" insert "20 days".

**4.3(2)** In lieu of the words "(designate agency)" insert "the division".

**4.3(3)** In lieu of the words "(designate office)" insert "the division director's office". In lieu of the words "(designate agency)" insert "the division". In lieu of the words "(AGENCY NAME)" insert "DIVISION OF SOIL CON-

SERVATION, DEPARTMENT OF AGRICULTURE AND LAND STEWARDSHIP". Delete paragraph "6" and insert in lieu thereof "6. A statement that the intervenor consents to be bound by the determination of the matters presented in the declaratory order proceeding."

**27—4.4(17A,161A) Briefs.** In lieu of the words "(designate agency)" insert "division".

**27—4.5(17A,161A) Inquiries.** In lieu of the words "(designate official by full title and address)" insert "the Director of the Division of Soil Conservation, Department of Agriculture and Land Stewardship, Wallace State Office Building, East Ninth and Grand, Des Moines, Iowa 50319".

**27—4.6(17A,161A) Service and filing of petitions and other papers.**

**4.6(2)** In lieu of the words "(specify office and address)" insert "the Director of the Division of Soil Conservation, Department of Agriculture and Land Stewardship, Wallace State Office Building, East Ninth and Grand, Des Moines, Iowa 50319". In lieu of the words "(agency name)" insert "division".

**4.6(3)** In lieu of the words "(uniform rule on contested cases X.12(17A))" insert "rule 27—3.12(17A,161A)".

**27—4.7(17A,161A) Consideration.** In lieu of the words "(designate agency)" insert "division".

**27—4.8(17A,161A) Action on petition.**

**4.8(1)** In lieu of the words "(designate agency head)" insert "the director of the division of soil conservation".

**4.8(2)** In lieu of the words and numbers "(contested case uniform rule X.2(17A))" insert "rule 27—3.2(17A,161A)".

**27—4.9(17A,161A) Refusal to issue order.**

**4.9(1)** In lieu of the words "(designate agency)" insert "division".

**27—4.12(17A,161A) Effect of a declaratory order.** In lieu of the words "(designate agency)" insert "Division". Delete the words "(who consent to be bound)".

ITEM 3. Adopt a new Chapter 5 as follows:

CHAPTER 5  
AGENCY PROCEDURE FOR RULE MAKING

The uniform rules on agency procedure for rule making published in the February 24, 1999, Iowa Administrative Bulletin are adopted by reference with the following amendments:

**27—5.1(17A,161A) Applicability.** In lieu of the word "agency" insert "the division of soil conservation, department of agriculture and land stewardship (hereinafter referred to as "the division")".

**27—5.3(17A,161A) Public rule-making docket.**

**5.3(2)** In lieu of the words "(commission, board, council, director)" insert "director of the division of soil conservation".

**27—5.4(17A,161A) Notice of proposed rule making.**

**5.4(3)** In lieu of the words "(specify time period)" insert "one year".

**27—5.5(17A,161A) Public participation.**

**5.5(1)** In lieu of the words "(identify office and address)" insert "the Director of the Division of Soil Conservation, Department of Agriculture and Land Stewardship, Wallace

## SOIL CONSERVATION DIVISION[27](cont'd)

State Office Building, East Ninth and Grand, Des Moines, Iowa 50319”.

5.5(5) In lieu of the words “(designate office and telephone number)” insert “the division director’s office at (515)281-6146”.

**27—5.6(17A,161A) Regulatory analysis.**

5.6(2) In lieu of the words “(designate office)” insert “the division director’s office”.

**27—5.10(17A,161A) Exemptions from public rule-making procedures.**

Subrule 5.10(2) is deleted and subsequent subrules are re-numbered.

**27—5.11(17A,161A) Concise statement of reasons.**

5.11(1) In lieu of the words “(specify the office and address)” insert “the Director of the Division of Soil Conservation, Department of Agriculture and Land Stewardship, Wallace State Office Building, East Ninth and Grand, Des Moines, Iowa 50319”.

**27—5.13(17A,161A) Agency rule-making record.**

5.13(2) In lieu of the words “(agency head)” insert “director of the division of soil conservation”.

**ARC 8793A****STATE PUBLIC DEFENDER[493]****Notice of Intended Action**

Twenty-five interested persons, a governmental subdivision, an agency or association of 25 or more persons may demand an oral presentation hereon as provided in Iowa Code section 17A.4(1)“b.”

Notice is also given to the public that the Administrative Rules Review Committee may, on its own motion or on written request by any individual or group, review this proposed action under section 17A.8(6) at a regular or special meeting where the public or interested persons may be heard.

Pursuant to the authority of Iowa Code section 13B.4(7), the State Public Defender hereby gives Notice of Intended Action to rescind Chapter 3, “Declaratory Rulings,” and to adopt a new Chapter 3, “Declaratory Orders,” and to adopt Chapter 5, “Agency Procedure for Rule Making,” Iowa Administrative Code.

The proposed amendments bring the Agency’s rules on administrative rule making and declaratory orders into conformance with 1998 Iowa Acts, chapter 1202, which amended the Iowa Administrative Procedure Act.

The Agency’s proposed amendments to its rules are based on the amendments to the Uniform Rules on Agency Procedure drafted by a task force from the Attorney General’s Office and published in the Iowa Administrative Bulletin on February 24, 1999.

Interested persons may make written comments or suggestions on the proposed amendments on or before April 13, 1999. Written materials should be addressed to the State Public Defender, Lucas State Office Building, 321 East 12th Street, Des Moines, Iowa 50319-0087, or faxed to (515) 281-7289. E-mail may be sent to msmith@spd.state.ia.us.

These amendments are intended to implement Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202, and Iowa Code section 25B.6.

The following amendments are proposed.

ITEM 1. Rescind 493—Chapter 3 and adopt the following **new** chapter in lieu thereof:

**CHAPTER 3  
DECLARATORY ORDERS**

The state public defender adopts the declaratory orders segment of the Uniform Rules on Agency Procedure which is printed in the first volume of the Iowa Administrative Code with the following amendments.

**493—3.1(17A) Petition for declaratory order.** In lieu of the words “(designate agency)”, insert “state public defender”. In lieu of the words “(designate office)”, insert “the Office of the State Public Defender, Lucas State Office Building, 321 East 12th Street, Des Moines, Iowa 50319-0087”. In lieu of the words “(AGENCY NAME)”, the heading on the petition form should read:

**BEFORE THE STATE PUBLIC DEFENDER**

**493—3.2(17A) Notice of petition.** In lieu of the words “\_\_\_ days (15 or less)”, insert “15 days”. In lieu of the words “(designate agency)”, insert “state public defender”.

**493—3.3(17A) Intervention.**

3.3(1) In lieu of the words “within \_\_\_ days”, insert “within 15 days”. Strike the words “(after time for notice under X.2(17A))”. In lieu of the number “X.8(17A)”, insert “3.8(17A)”.

3.3(2) In lieu of the words “(designate agency)”, insert “state public defender”.

3.3(3) In lieu of the words “(designate office)”, insert “the Office of the State Public Defender, Lucas State Office Building, 321 East 12th Street, Des Moines, Iowa 50319-0087”. In lieu of the words “(designate agency)”, insert “state public defender”. In lieu of the words “(AGENCY NAME)”, the heading on the petition form should read:

**BEFORE THE STATE PUBLIC DEFENDER**

**493—3.4(17A) Briefs.** In lieu of the words “(designate agency)”, insert “state public defender”.

**493—3.5(17A) Inquiries.** In lieu of the words “(designate official by full title and address)”, insert “the State Public Defender, Lucas State Office Building, 321 East 12th Street, Des Moines, Iowa 50319-0087”.

**493—3.6(17A) Service and filing of petitions and other papers.**

3.6(2) In lieu of the words “(specify office and address)”, insert “the Office of the State Public Defender, Lucas State Office Building, 321 East 12th Street, Des Moines, Iowa 50319-0087”. In lieu of the words “(agency name)”, insert “state public defender”.

3.6(3) In lieu of the words “(uniform rule on contested cases X.12(17A))”, insert “rule 481—10.12(17A)”.

**493—3.7(17A) Consideration.** In lieu of the words “(designate agency)”, insert “state public defender”.

**493—3.8(17A) Action on petition.**

3.8(1) In lieu of the words “(designate agency head)”, insert “state public defender”.

3.8(2) In lieu of the words “(contested case uniform rule X.2(17A))”, insert “rule 481—10.1(10A)”.

**493—3.9(17A) Refusal to issue order.**

3.9(1) In lieu of the words “(designate agency)”, insert “state public defender”.

## STATE PUBLIC DEFENDER[493](cont'd)

**493—3.12(17A) Effect of a declaratory order.** In lieu of the words “(designate agency)”, insert “state public defender”.

These rules are intended to implement Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202, section 13.

ITEM 2. Adopt new 493—Chapter 5 as follows:

## CHAPTER 5

## AGENCY PROCEDURE FOR RULE MAKING

The state public defender adopts the agency procedure for rule making segment of the Uniform Rules on Agency Procedure which is printed in the first volume of the Iowa Administrative Code with the following amendments.

**493—5.3(17A) Public rule-making docket.**

**5.3(2)** Anticipated rule making. In lieu of the words “(commission, board, council, director)”, insert “state public defender”.

**493—5.4(17A) Notice of proposed rule making.**

**5.4(3)** Copies of notices. In lieu of the words “(specify time period)”, insert “one calendar year”.

**493—5.5(17A) Public participation.**

**5.5(1)** Written comments. Strike the words “(identify office and address) or”.

**5.5(5)** Accessibility. In lieu of the words “(designate office and telephone number)”, insert “the office of the state public defender at (515)242-6158”.

**493—5.6(17A) Regulatory analysis.**

**5.6(2)** Mailing list. In lieu of the words “(designate office)”, insert “the Office of the State Public Defender, Lucas State Office Building, 321 East 12th Street, Des Moines, Iowa 50319-0087”.

**493—5.10(17A) Exemptions from public rule-making procedures.**

**5.10(2)** Categories exempt. In lieu of the words “(List here narrowly drawn classes of rules where such an exemption is justified and a brief statement of the reasons for exempting each of them)”, insert the following:

“a. Rules which are mandated by federal law or regulation in any situation where the department has no option but to adopt specified rules or where federal funding is contingent upon the adoption of the rules;

“b. Rules which implement recent legislation when a statute provides for an effective date which does not allow for the usual notice and public participation requirements;

“c. Rules which confer a benefit or remove a restriction on licensees, the public or some segment of the public;

“d. Rules which are necessary because of imminent peril to the public health, safety or welfare; and

“e. Nonsubstantive rules intended to correct typographical errors, incorrect citations, or other errors in existing rules.”

**493—5.11(17A) Concise statement of reasons.**

**5.11(1)** General. In lieu of the words “(specify the office and address)”, insert “the Office of the State Public Defender, Lucas State Office Building, 321 East 12th Street, Des Moines, Iowa 50319-0087”.

**493—5.13(17A) Agency rule-making record.**

**5.13(2)** Contents.

c. In lieu of the words “(agency head)”, insert “state public defender”.

These rules are intended to implement Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202, and Iowa Code section 25B.6.

## ARC 8816A

## STATUS OF WOMEN DIVISION[435]

## Notice of Intended Action

Twenty-five interested persons, a governmental subdivision, an agency or association of 25 or more persons may demand an oral presentation hereon as provided in Iowa Code section 17A.4(1)“b.”

Notice is also given to the public that the Administrative Rules Review Committee may, on its own motion or on written request by any individual or group, review this proposed action under section 17A.8(6) at a regular or special meeting where the public or interested persons may be heard.

Pursuant to the authority of Iowa Code sections 17A.3 and 216A.54, the Commission on the Status of Women, Department of Human Rights, gives Notice of Intended Action to adopt Chapter 7, “Declaratory Orders,” Chapter 8, “Petitions for Rule Making,” and Chapter 9, “Agency Procedures for Rule Making,” Iowa Administrative Code.

The adoption of Chapters 7, 8, and 9 will govern declaratory orders, petitions for rule making, and procedures for rule making.

The Seventy-seventh General Assembly in 1998 Iowa Acts, chapter 1202, passed amendments to the Iowa Administrative Procedure Act. The Attorney General’s Office drafted amendments to the Uniform Rules on Agency Procedure to implement the amendments to the Iowa Administrative Procedure Act. The Commission is adopting the uniform rules.

The Commission believes these changes will bring the Commission’s rules into compliance with the 1998 Iowa Acts, chapter 1202, which becomes effective July 1, 1999.

Any interested person may make written suggestions or comments on the amendments on or before April 13, 1999. Such written suggestions or comments should be directed to the Administrator, Division on the Status of Women, Department of Human Rights, Lucas State Office Building, Des Moines, Iowa 50319.

Persons are also invited to present oral or written suggestions or comments at a public hearing which will be held on April 13, 1999, at 10 a.m. in the Director’s Conference Room, Department of Human Rights, Lucas State Office Building, Des Moines, Iowa 50319. At the hearing, persons will be asked to confine their remarks to the subjects of the amendments.

These amendments are intended to implement Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202, and Iowa Code section 216A.54.

The following amendment is proposed.

Adopt the following new chapters:

## CHAPTER 7

## DECLARATORY ORDERS

**435—7.1(17A) Adoption by reference.** The commission on the status of women hereby adopts the declaratory orders segment of the Uniform Rules on Agency Procedure which are printed in the first volume of the Iowa Administrative Code, with the following amendments:

## STATUS OF WOMEN DIVISION[435](cont'd)

1. In lieu of the words "(designate agency)", insert "division on the status of women".

2. In lieu of the words "(designate office)", insert "Division on the Status of Women, Department of Human Rights, Lucas State Office Building, Des Moines, Iowa 50319".

3. In lieu of the words "(AGENCY NAME)", insert "DIVISION ON THE STATUS OF WOMEN".

4. In lieu of the words "\_\_\_\_ days (15 or less)", insert "10 days".

5. In lieu of the words "\_\_\_\_ days" in subrule 6.3(1), insert "20 days".

6. In lieu of the words "(designate official by full title and address)", insert "Administrator, Division on the Status of Women, Department of Human Rights, Lucas State Office Building, Des Moines, Iowa 50319".

7. In lieu of the words "(specify office and address)", insert "Division on the Status of Women, Department of Human Rights, Lucas State Office Building, Des Moines, Iowa 50319".

8. In lieu of the words "(agency name)", insert "division on the status of women".

9. In lieu of the words "(designate agency head)", insert "administrator".

These rules are intended to implement Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202.

#### CHAPTER 8 PETITIONS FOR RULE MAKING

**435—8.1(17A) Adoption by reference.** The commission on the status of women hereby adopts the petitions for rule making segment of the Uniform Rules on Agency Procedure which are printed in the first volume of the Iowa Administrative Code, with the following amendments:

1. In lieu of the words "(designate office)", insert "Division on the Status of Women, Department of Human Rights, Lucas State Office Building, Des Moines, Iowa 50319".

2. In lieu of the words "(AGENCY NAME)", insert "DIVISION ON THE STATUS OF WOMEN".

3. In lieu of the words "(designate official by full title and address)", insert "Administrator, Division on the Status of Women, Department of Human Rights, Lucas State Office Building, Des Moines, Iowa 50319".

These rules are intended to implement Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202.

#### CHAPTER 9 AGENCY PROCEDURE FOR RULE MAKING

**435—9.1(17A) Adoption by reference.** The commission on the status of women hereby adopts the agency procedure for rule making segment of the Uniform Rules on Agency Procedure which are printed in the first volume of the Iowa Administrative Code, with the following amendments:

1. In lieu of the words "(commission, board, council, director)", insert "administrator".

2. In lieu of the words "(specify time period)", insert "one year".

3. In lieu of the words "(identify office and address)", insert "Administrator, Division on the Status of Women, Department of Human Rights, Lucas State Office Building, Des Moines, Iowa 50319".

4. In lieu of the words "(designate office and telephone number)", insert "the administrator at (515)281-4461".

5. In lieu of the words "(designate office)", insert "Division on the Status of Women, Department of Human Rights, Lucas State Office Building, Des Moines, Iowa 50319".

6. In lieu of the words "(specify the office and address)", insert "Division on the Status of Women, Department of Human Rights, Lucas State Office Building, Des Moines, Iowa 50319".

7. In lieu of the words "(agency head)", insert "administrator".

These rules are intended to implement Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202.

## ARC 8841A

### TELECOMMUNICATIONS AND TECHNOLOGY COMMISSION, IOWA[751]

#### Notice of Intended Action

Twenty-five interested persons, a governmental subdivision, an agency or association of 25 or more persons may demand an oral presentation hereon as provided in Iowa Code section 17A.4(1)"b."

Notice is also given to the public that the Administrative Rules Review Committee may, on its own motion or on written request by any individual or group, review this proposed action under section 17A.8(6) at a regular or special meeting where the public or interested persons may be heard.

Pursuant to the authority of Iowa Code sections 17A.3(1)"b" and 8D.3, the Iowa Telecommunications and Technology Commission proposes to rescind Chapter 3, "Petitions for Rule Making and Petitions for Declaratory Rulings," and Chapter 4, "Contested Cases," and to adopt a new Chapter 3, "Declaratory Orders," a new Chapter 4, "Contested Cases," and a new Chapter 18, "Procedure for Rule Making," Iowa Administrative Code.

These amendments revise the Commission's rules governing procedures for contested case proceedings, rule making, petitions for rule making, and declaratory orders.

The Seventy-seventh General Assembly passed amendments to the Iowa Administrative Procedure Act in 1998 Iowa Acts, chapter 1202. A task force from the Attorney General's Office has drafted amendments to the Uniform Rules on Agency Procedure to implement the amendments to the Administrative Procedure Act. The Commission's proposed rules are based on the amendments of the Attorney General's task force, with some omissions and modifications to fit the Commission's needs. The task force's amendments are available at the State Law Library, Capitol Building, Des Moines, Iowa, or on the Attorney General's Web site at <http://www.state.ia.us/government/ag/deptdir.htm>.

With these revisions, the Commission's rules will be in compliance with 1998 Iowa Acts, chapter 1202. The major changes governing the rule-making process in 1998 Iowa Acts, chapter 1202, which are to be effective July 1, 1999, are as follows:

- In Chapter 3 the Commission has revised its rules governing declaratory orders to be consistent with the changes in the law. The purpose is the same, but requirements are more specific than in current law. Rules are added to provide for petitions for intervention.

- In Chapter 4 the Commission has revised its contested case rules to be consistent with the changes in the law. The rule provides for the selection of the presiding officer at hearings, ex parte communications with presiding officers, motion practice, default orders, emergency adjudicative proceedings, and stay orders.

- In Chapter 18 the Commission has included rules governing rule making, the regulatory analysis of a rule and the requirements for economic impact statements. The rule

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also refers to the requirements for fiscal notes required by the Iowa Code. The rule-making provisions also provide for rule reviews to determine whether a rule should be repealed or amended or a new rule adopted. The rule requires the Commission to make this review if such a review has not been conducted in the previous five years. The rule identifies the various members of government or the public that have the right to make this request.

Consideration will be given to all written data, views, and arguments thereto received by the Iowa Telecommunications and Technology Commission, ICN, Camp Dodge, W4 Railroad Avenue, P.O. Box 587, Johnston, Iowa 50131-0587, on or before April 16, 1999.

These amendments are intended to implement Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202, and Iowa Code section 25B.6.

The following amendments are proposed.

ITEM 1. Rescind 751—Chapter 3 and adopt a new Chapter 3 as follows:

CHAPTER 3  
DECLARATORY ORDERS

**751—3.1(17A) Petition for declaratory order.** Any person may file a petition with the Iowa telecommunications and technology commission for a declaratory order as to the applicability to specified circumstances of a statute, rule, or order within the primary jurisdiction of the commission at ICN, Camp Dodge, W4 Railroad Avenue, P.O. Box 587, Johnston, Iowa 50131-0587. A petition is deemed filed when it is received by that office. The commission shall provide the petitioner with a file-stamped copy of the petition if the petitioner provides the commission an extra copy for this purpose. The petition must be typewritten or legibly handwritten in ink and must substantially conform to the following form:

BEFORE THE IOWA TELECOMMUNICATIONS AND  
TECHNOLOGY COMMISSION

Petition by (Name of Petitioner) }  
for a Declaratory Order on (Cite }  
provisions of law involved). }  
PETITION FOR  
DECLARATORY  
ORDER

The petition must provide the following information:

1. A clear and concise statement of all relevant facts on which the order is requested.
2. A citation and the relevant language of the specific statutes, rules, policies, decisions, or orders, whose applicability is questioned, and any other relevant law.
3. The questions petitioner wants answered, stated clearly and concisely.
4. The answers to the questions desired by the petitioner and a summary of the reasons urged by the petitioner in support of those answers.
5. The reasons for requesting the declaratory order and disclosure of the petitioner's interest in the outcome.
6. A statement indicating whether the petitioner is currently a party to another proceeding involving the questions at issue and whether, to the petitioner's knowledge, those questions have been decided by, are pending determination by, or are under investigation by, any governmental entity.
7. The names and addresses of other persons, or a description of any class of persons, known by petitioner to be

affected by, or interested in, the questions presented in the petition.

8. Any request by petitioner for a meeting provided for by 3.7(17A).

The petition must be dated and signed by the petitioner or the petitioner's representative. It must also include the name, mailing address, and telephone number of the petitioner and petitioner's representative, and a statement indicating the person to whom communications concerning the petition should be directed.

**751—3.2(17A) Notice of petition.** Within 15 days after receipt of a petition for a declaratory order, the commission shall give notice of the petition to all persons not served by the petitioner pursuant to rule 3.6(17A) to whom notice is required by any provision of law. The Iowa telecommunications and technology commission may also give notice to any other persons.

**751—3.3(17A) Intervention.**

**3.3(1)** Persons who qualify under any applicable provision of law as an intervenor and who file a petition for intervention within 20 days of the filing of a petition for declaratory order shall be allowed to intervene in a proceeding for a declaratory order.

**3.3(2)** Any person who files a petition for intervention at any time prior to the issuance of an order may be allowed to intervene in a proceeding for a declaratory order at the discretion of the Iowa telecommunications and technology commission.

**3.3(3)** A petition for intervention shall be filed at ICN, Camp Dodge, W4 Railroad Avenue, P.O. Box 587, Johnston, Iowa 50131-0587. Such a petition is deemed filed when it is received by that office. The commission will provide the petitioner with a file-stamped copy of the petition for intervention if the petitioner provides an extra copy for this purpose. A petition for intervention must be typewritten or legibly handwritten in ink and must substantially conform to the following form:

BEFORE THE IOWA TELECOMMUNICATIONS AND  
TECHNOLOGY COMMISSION

Petition by (Name of Original }  
Petitioner) for a Declaratory }  
Order on (Cite provisions of }  
law cited in original petition). }  
PETITION FOR  
INTERVENTION

The petition for intervention must provide the following information:

1. Facts supporting the intervenor's standing and qualifications for intervention.
2. The answers urged by the intervenor to the question or questions presented and a summary of the reasons urged in support of those answers.
3. Reasons for requesting intervention and disclosure of the intervenor's interest in the outcome.
4. A statement indicating whether the intervenor is currently a party to any proceeding involving the questions at issue and whether, to the intervenor's knowledge, those questions have been decided by, are pending determination by, or are under investigation by, any governmental entity.
5. The names and addresses of any additional persons, or a description of any additional class of persons, known by

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the intervenor to be affected by, or interested in, the questions presented.

6. Whether the intervenor consents to be bound by the determination of the matters presented in the declaratory order proceeding.

The petition must be dated and signed by the intervenor or the intervenor's representative. It must also include the name, mailing address, and telephone number of the intervenor and intervenor's representative, and a statement indicating the person to whom communications should be directed.

**751—3.4(17A) Briefs.** The petitioner or any intervenor may file a brief in support of the position urged. The Iowa telecommunications and technology commission may request a brief from the petitioner, any intervenor, or any other person concerning the questions raised.

**751—3.5(17A) Inquiries.** Inquiries concerning the status of a declaratory order proceeding may be made to the Executive Director, ICN, Camp Dodge, W4 Railroad Avenue, P.O. Box 587, Johnston, Iowa 50131-0587.

**751—3.6(17A) Service and filing of petitions and other papers.**

**3.6(1)** When service required. Except where otherwise provided by law, every petition for declaratory order, petition for intervention, brief, or other paper filed in a proceeding for a declaratory order shall be served upon each of the parties of record to the proceeding, and on all other persons identified in the petition for declaratory order or petition for intervention as affected by or interested in the questions presented, simultaneously with their filing. The party filing a document is responsible for service on all parties and other affected or interested persons.

**3.6(2)** Filing—when required. All petitions for declaratory orders, petitions for intervention, briefs, or other papers in a proceeding for a declaratory order shall be filed with the Iowa Telecommunications and Technology Commission, ICN, Camp Dodge, W4 Railroad Avenue, P.O. Box 587, Johnston, Iowa 50131-0587. Petitions, briefs, or other papers that are required to be served upon a party shall be filed simultaneously with the Iowa telecommunications and technology commission.

**3.6(3)** Method of service, time of filing, and proof of mailing. Method of service, time of filing, and proof of mailing shall be as provided by rule 751—4.12(17A).

**751—3.7(17A) Consideration.** Upon request by petitioner, the Iowa telecommunications and technology commission must schedule a brief and informal meeting between the original petitioner, all intervenors, and the commission, a member of the commission, or a member of the staff of the commission, to discuss the questions raised. The commission may solicit comments from any person on the questions raised. Also, comments on the questions raised may be submitted to the commission by any person.

**751—3.8(17A) Action on petition.**

**3.8(1)** Within the time allowed by 1998 Iowa Acts, chapter 1202, section 13(5), after receipt of a petition for a declaratory order, the executive director or designee shall take action on the petition as required by 1998 Iowa Acts, chapter 1202, section 13(5).

**3.8(2)** The date of issuance of an order or of a refusal to issue an order is as defined in rule 751—4.2(17A).

**751—3.9(17A) Refusal to issue order.**

**3.9(1)** The Iowa telecommunications and technology commission shall not issue a declaratory order where prohib-

ited by 1998 Iowa Acts, chapter 1202, section 13(1), and may refuse to issue a declaratory order on some or all questions raised for the following reasons:

1. The petition does not substantially comply with the required form.

2. The petition does not contain facts sufficient to demonstrate that the petitioner will be aggrieved or adversely affected by the failure of the commission to issue an order.

3. The commission does not have jurisdiction over the questions presented in the petition.

4. The questions presented by the petition are also presented in a current rule making, contested case, or other commission or judicial proceeding, that may definitively resolve them.

5. The questions presented by the petition would more properly be resolved in a different type of proceeding or by another body with jurisdiction over the matter.

6. The facts or questions presented in the petition are unclear, overbroad, insufficient, or otherwise inappropriate as a basis upon which to issue an order.

7. There is no need to issue an order because the questions raised in the petition have been settled due to a change in circumstances.

8. The petition is not based upon facts calculated to aid in the planning of future conduct but is, instead, based solely upon prior conduct in an effort to establish the effect of that conduct or to challenge a commission decision already made.

9. The petition requests a declaratory order that would necessarily determine the legal rights, duties, or responsibilities of other persons who have not joined in the petition, intervened separately, or filed a similar petition and whose position on the questions presented may fairly be presumed to be adverse to that of petitioner.

10. The petitioner requests the commission to determine whether a statute is unconstitutional on its face.

**3.9(2)** A refusal to issue a declaratory order must indicate the specific grounds for the refusal and constitutes final commission action on the petition.

**3.9(3)** Refusal to issue a declaratory order pursuant to this provision does not preclude the filing of a new petition that seeks to eliminate the grounds for the refusal to issue an order.

**751—3.10(17A) Contents of declaratory order—effective date.** In addition to the order itself, a declaratory order must contain the date of its issuance, the name of petitioner and all intervenors, the specific statutes, rules, policies, decisions, or orders involved, the particular facts upon which it is based, and the reasons for its conclusion.

A declaratory order is effective on the date of issuance.

**751—3.11(17A) Copies of orders.** A copy of all orders issued in response to a petition for a declaratory order shall be mailed promptly to the original petitioner and all intervenors.

**751—3.12(17A) Effect of a declaratory order.** A declaratory order has the same status and binding effect as a final order issued in a contested case proceeding. It is binding on the commission, the petitioner, and any intervenors (who consent to be bound) and is applicable only in circumstances where the relevant facts and the law involved are indistinguishable from those on which the order was based. As to all other persons, a declaratory order serves only as precedent and is not binding on the commission. The issuance of a declaratory order constitutes final commission action on the petition.

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These rules are intended to implement Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202.

ITEM 2. Rescind 751—Chapter 4 and adopt a new Chapter 4 as follows:

**CHAPTER 4  
CONTESTED CASES**

**751—4.1(17A) Scope and applicability.** This chapter applies to contested case proceedings conducted by the Iowa telecommunications and technology commission. Contested cases generally include, but are not limited to, appeals of administrative orders issued by the executive director, contract awards, and the withdrawal of an authorized user's right to use the service offered by the commission.

**751—4.2(17A) Definitions.** Except where otherwise specifically defined by law:

"Commission" means the Iowa telecommunications and technology commission, as designated in Iowa Code chapter 8D, as having appellate jurisdiction over a particular matter.

"Contested case" means a proceeding defined by Iowa Code section 17A.2(5) and includes any matter defined as a no factual dispute contested case under 1998 Iowa Acts, chapter 1202, section 14.

"Executive director" means the director or an authorized representative of the commission.

"Issuance" means the date of mailing of a decision or order or date of delivery if service is by other means unless another date is specified in the order.

"Party" means each person or commission named or admitted as a party or properly seeking and entitled as of right to be admitted as a party.

"Presiding officer" means the administrative law judge or, under certain circumstances, members of the commission or the entire commission.

"Proposed decision" means the presiding officer's recommended findings of fact, conclusions of law, decision, and order in a contested case in which the entire commission did not preside.

**751—4.3(17A) Time requirements.**

**4.3(1)** Time shall be computed as provided in Iowa Code section 4.1(34).

**4.3(2)** For good cause, the presiding officer may extend or shorten the time to take any action, except as precluded by statute or by rule. Except for good cause stated in the record, before extending or shortening the time to take any action, the presiding officer shall afford all parties an opportunity to be heard or to file written arguments.

**751—4.4(17A) Requests for contested case proceeding.** Any person claiming an entitlement to a contested case proceeding shall file a written request for such a proceeding within the time specified by the particular rules or statutes governing the subject matter or, in the absence of such law, the time specified in the commission action in question.

The request for a contested case proceeding should state the name and address of the requester, identify the specific commission action which is disputed, and where the requester is represented by a lawyer identify the provisions of law or precedent requiring or authorizing the holding of a contested case proceeding in the particular circumstances involved, and include a short and plain statement of the issues of material fact in dispute.

**751—4.5(17A) Notice of hearing.**

**4.5(1) Delivery.** Delivery of the notice of hearing constitutes the commencement of the contested case proceeding. Delivery may be executed by:

- a. Personal service as provided in the Iowa Rules of Civil Procedure; or
- b. Certified mail, return receipt requested; or
- c. First-class mail; or
- d. Publication, as provided in the Iowa Rules of Civil Procedure.

**4.5(2) Contents.** The notice of hearing shall contain the following information:

- a. A statement of the time, place, and nature of the hearing;
- b. A statement of the legal authority and jurisdiction under which the hearing is to be held;
- c. A reference to the particular sections of the statutes and rules involved;
- d. A short and plain statement of the matters asserted. If the commission or other party is unable to state the matters in detail at the time the notice is served, the initial notice may be limited to a statement of the issues involved. Thereafter, upon application, a more definite and detailed statement shall be furnished;
- e. Identification of all parties including the name, address and telephone number of the person who will act as advocate for the commission or the state and of parties' counsel where known;
- f. Reference to the procedural rules governing conduct of the contested case proceeding;
- g. Reference to the procedural rules governing informal settlement;
- h. Identification of the presiding officer, if known. If not known, a description of who will serve as presiding officer (e.g., the commission, members of the commission, administrative law judge from the department of inspections and appeals); and
- i. Notification of the time period in which a party may request, pursuant to 1998 Iowa Acts, chapter 1202, section 15(1), and rule 4.6(17A), that the presiding officer be an administrative law judge.

**751—4.6(17A) Presiding officer.**

**4.6(1)** In each contested case in which Iowa Code chapter 17A requires an evidentiary hearing, the chair of the commission will determine whether the hearing shall be held before the commission, one or more members of the commission, or an administrative law judge. Any party who wishes to request that the presiding officer assigned to render a proposed decision be an administrative law judge employed by the department of inspections and appeals must file a written request within 20 days after service of a notice of hearing which identifies or describes the presiding officer as the commission head or members of the commission.

**4.6(2)** The executive director may deny the request only upon a finding that one or more of the following apply:

- a. Neither the commission nor any officer of the commission under whose authority the contested case is to take place is a named party to the proceeding or a real party in interest to that proceeding.
- b. There is a compelling need to expedite issuance of a final decision in order to protect the public health, safety, or welfare.
- c. The case involves significant policy issues of first impression that are inextricably intertwined with the factual issues presented.
- d. The demeanor of the witnesses is likely to be dispositive in resolving the disputed factual issues.

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e. Funds are unavailable to pay the costs of an administrative law judge and an intercommission appeal.

f. The request was not timely filed.

g. The request is not consistent with a specified statute.

**4.6(3)** The executive director shall issue a written ruling specifying the grounds for its decision within 20 days after a request for an administrative law judge is filed. If the ruling is contingent upon the availability of an administrative law judge with the qualifications identified in subrule 4.6(4), the parties shall be notified at least 10 days prior to the hearing if a qualified administrative law judge will not be available.

**4.6(4)** An administrative law judge assigned to act as presiding officer in telecommunications matters shall have the following technical expertise: must be familiar with telecommunications transactions.

**4.6(5)** Except as provided otherwise by another provision of law, all rulings by an administrative law judge acting as presiding officer are subject to appeal to the commission. A party must seek any available intracommission appeal in order to exhaust adequate administrative remedies.

**4.6(6)** Unless otherwise provided by law, commission heads and members of multimembered commission heads, when reviewing a proposed decision upon intracommission appeal, shall have the powers of and shall comply with the provisions of this chapter which apply to presiding officers.

**751—4.7(17A) Waiver of procedures.** Unless otherwise precluded by law, the parties in a contested case proceeding may waive any provision of this chapter. However, the commission in its discretion may refuse to give effect to such a waiver when it deems the waiver to be inconsistent with the public interest.

**751—4.8(17A) Telephone or network proceedings.** The presiding officer may resolve preliminary procedural motions by telephone conference or on the Iowa Communications Network in which all parties have an opportunity to participate. Other telephone or network proceedings, including the hearing for the contested case proceeding, may be held with the consent of all parties. The presiding officer will determine the location of the parties and witnesses for telephone or network hearings. The convenience of the witnesses or parties, as well as the nature of the case, will be considered when location is chosen. The cost of the telephone hearing or network hearing may be assessed equally to each party.

**751—4.9(17A) Disqualification.**

**4.9(1)** A presiding officer or other person shall withdraw from participation in the making of any proposed or final decision in a contested case if that person:

a. Has a personal bias or prejudice concerning a party or a representative of a party;

b. Has personally investigated, prosecuted or advocated in connection with that case, the specific controversy underlying that case, another pending factually related contested case, or a pending factually related controversy that may culminate in a contested case involving the same parties;

c. Is subject to the authority, direction or discretion of any person who has personally investigated, prosecuted or advocated in connection with that contested case, the specific controversy underlying that contested case, or a pending factually related contested case or controversy involving the same parties;

d. Has acted as counsel to any person who is a private party to that proceeding within the past two years;

e. Has a personal financial interest in the outcome of the case or any other significant personal interest that could be substantially affected by the outcome of the case;

f. Has a spouse or relative within the third degree of relationship that (1) is a party to the case, or an officer, director or trustee of a party; (2) is a lawyer in the case; (3) is known to have an interest that could be substantially affected by the outcome of the case; or (4) is likely to be a material witness in the case; or

g. Has any other legally sufficient cause to withdraw from participation in the decision making in that case.

**4.9(2)** The term "personally investigated" means taking affirmative steps to interview witnesses directly or to obtain documents or other information directly. The term "personally investigated" does not include general direction and supervision of assigned investigators, unsolicited receipt of information which is relayed to assigned investigators, review of another person's investigative work product in the course of determining whether there is probable cause to initiate a proceeding, or exposure to factual information while performing other commission functions, including fact gathering for purposes other than investigation of the matter which culminates in a contested case. Factual information relevant to the merits of a contested case received by a person who later serves as presiding officer in that case shall be disclosed if required by Iowa Code section 17A.17 as amended by 1998 Iowa Acts, chapter 1202, section 19, and subrules 4.9(3) and 4.23(9).

**4.9(3)** In a situation where a presiding officer or other person knows of information which might reasonably be deemed to be a basis for disqualification and decides voluntary withdrawal is unnecessary, that person shall submit the relevant information for the record by affidavit and shall provide for the record a statement of the reasons for the determination that withdrawal is unnecessary.

**4.9(4)** If a party asserts disqualification on any appropriate ground, including those listed in subrule 4.9(1), the party shall file a motion supported by an affidavit pursuant to 1998 Iowa Acts, chapter 1202, section 19(7). The motion must be filed as soon as practicable after the reason alleged in the motion becomes known to the party. If, during the course of the hearing, a party first becomes aware of evidence of bias or other grounds for disqualification, the party may move for disqualification but must establish the grounds by the introduction of evidence into the record.

If the presiding officer determines that disqualification is appropriate, the presiding officer or other person shall withdraw. If the presiding officer determines that withdrawal is not required, the presiding officer shall enter an order to that effect. A party asserting disqualification may seek an interlocutory appeal under rule 4.25(17A) and seek a stay under rule 4.29(17A).

**751—4.10(17A) Consolidation—severance.**

**4.10(1)** Consolidation. The presiding officer may consolidate any or all matters at issue in two or more contested case proceedings where (a) the matters at issue involve common parties or common questions of fact or law; (b) consolidation would expedite and simplify consideration of the issues involved; and (c) consolidation would not adversely affect the rights of any of the parties to those proceedings.

**4.10(2)** Severance. The presiding officer may, for good cause shown, order any contested case proceedings or portions thereof severed.

**751—4.11(17A) Pleadings.**

**4.11(1)** Pleadings may be required by rule, by the notice of hearing, or by order of the presiding officer.

**4.11(2)** Petition.

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a. Any petition required in a contested case proceeding shall be filed within 20 days of delivery of the notice of hearing or subsequent order of the presiding officer, unless otherwise ordered.

b. A petition shall state in separately numbered paragraphs the following:

(1) The persons or entities on whose behalf the petition is filed;

(2) The particular provisions of statutes and rules involved;

(3) The relief demanded and the facts and law relied upon for such relief; and

(4) The name, address and telephone number of the petitioner and the petitioner's attorney, if any.

**4.11(3) Answer.** An answer shall be filed within 20 days of service of the petition unless otherwise ordered. A party may move to dismiss or apply for a more definite and detailed statement when appropriate.

An answer shall show on whose behalf it is filed and specifically admit, deny, or otherwise answer all material allegations of the pleading to which it responds. It shall state any facts deemed to show an affirmative defense and contain as many additional defenses as the pleader may claim.

An answer shall state the name, address and telephone number of the person filing the answer, the person or entity on whose behalf it is filed, and the attorney representing that person, if any.

Any allegation in the petition not denied in the answer is considered admitted. The presiding officer may refuse to consider any defense not raised in the answer which could have been raised on the basis of facts known when the answer was filed if any party would be prejudiced.

**4.11(4) Amendment.** Any notice of hearing, petition, or other charging document may be amended before a responsive pleading has been filed. Amendments to pleadings after a responsive pleading has been filed and to an answer may be allowed with the consent of the other parties or in the discretion of the presiding officer who may impose terms or grant a continuance.

#### **751—4.12(17A) Service and filing of pleadings and other papers.**

**4.12(1)** When service required. Except where otherwise provided by law, every pleading, motion, document, or other paper filed in a contested case proceeding and every paper relating to discovery in such a proceeding shall be served upon each of the parties of record to the proceeding, including the person designated as advocate or prosecutor for the state or the commission, simultaneously with their filing. Except for the original notice of hearing and an application for rehearing as provided in Iowa Code section 17A.16(2), the party filing a document is responsible for service on all parties.

**4.12(2) Service—how made.** Service upon a party represented by an attorney shall be made upon the attorney unless otherwise ordered. Service is made by delivery or by mailing a copy to the person's last-known address. Service by mail is complete upon mailing, except where otherwise specifically provided by statute, rule, or order.

**4.12(3) Filing—when required.** After the notice of hearing, all pleadings, motions, documents or other papers in a contested case proceeding shall be filed with the Executive Director of the Commission, ICN, Camp Dodge, W4 Railroad Avenue, P.O. Box 587, Johnston, Iowa 50131-0587. All pleadings, motions, documents or other papers that are required to be served upon a party shall be filed simultaneously with the commission name.

**4.12(4) Filing—when made.** Except where otherwise provided by law, a document is deemed filed at the time it is delivered to the ICN, Camp Dodge, W4 Railroad Avenue, P.O. Box 587, Johnston, Iowa 50131-0587, delivered to an established courier service for immediate delivery to that office, or mailed by first-class mail or state interoffice mail to that office, so long as there is proof of mailing.

**4.12(5) Proof of mailing.** Proof of mailing includes either: a legible United States Postal Service postmark on the envelope, a certificate of service, a notarized affidavit, or a certification in substantially the following form:

I certify under penalty of perjury and pursuant to the laws of Iowa that, on (date of mailing), I mailed copies of (describe document) addressed to the Iowa Telecommunications and Technology Commission, ICN, Camp Dodge, W4 Railroad Avenue, P.O. Box 587, Johnston, Iowa 50131-0587, and to the names and addresses of the parties listed below by depositing the same in (a United States post office mailbox with correct postage properly affixed or state interoffice mail).

(Date) (Signature)

#### **751—4.13(17A) Discovery.**

**4.13(1)** Discovery procedures applicable in civil actions are applicable in contested cases. Unless lengthened or shortened by these rules or by order of the presiding officer, time periods for compliance with discovery shall be as provided in the Iowa Rules of Civil Procedure.

**4.13(2)** Any motion relating to discovery shall allege that the moving party has previously made a good-faith attempt to resolve the discovery issues involved with the opposing party. Motions in regard to discovery shall be ruled upon by the presiding officer. Opposing parties shall be afforded the opportunity to respond within ten days of the filing of the motion unless the time is shortened as provided in subrule 4.13(1). The presiding officer may rule on the basis of the written motion and any response, or may order argument on the motion.

**4.13(3)** Evidence obtained in discovery may be used in the contested case proceeding if that evidence would otherwise be admissible in that proceeding.

#### **751—4.14(17A) Subpoenas.**

**4.14(1) Issuance.**

a. A commission subpoena shall be issued to a party on request. Such a request must be in writing. In the absence of good cause for permitting later action, a request for a subpoena must be received at least three days before the scheduled hearing. The request shall include the name, address, and telephone number of the requesting party.

b. Except to the extent otherwise provided by law, parties are responsible for service of their own subpoenas and payment of witness fees and mileage expenses.

**4.14(2) Motion to quash or modify.** The presiding officer may quash or modify a subpoena for any lawful reason upon motion in accordance with the Iowa Rules of Civil Procedure. A motion to quash or modify a subpoena shall be set for argument promptly.

#### **751—4.15(17A) Motions.**

**4.15(1)** No technical form for motions is required. However, prehearing motions must be in writing, state the grounds for relief, and state the relief sought.

**4.15(2)** Any party may file a written response to a motion within ten days after the motion is served, unless the time period is extended or shortened by rules of the commission or the presiding officer. The presiding officer may consider a

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failure to respond within the required time period in ruling on a motion.

**4.15(3)** The presiding officer may schedule oral argument on any motion.

**4.15(4)** Motions pertaining to the hearing, except motions for summary judgment, must be filed and served at least ten days prior to the date of hearing unless there is good cause for permitting later action or the time for such action is lengthened or shortened by rule of the commission or an order of the presiding officer.

**4.15(5)** Motions for summary judgment. Motions for summary judgment shall comply with the requirements of Iowa Rule of Civil Procedure 237 and shall be subject to disposition according to the requirements of that rule to the extent such requirements are not inconsistent with the provisions of this rule or any other provision of law governing the procedure in contested cases.

Motions for summary judgment must be filed and served at least 45 days prior to the scheduled hearing date, or other time period determined by the presiding officer. Any party resisting the motion shall file and serve a resistance within 15 days, unless otherwise ordered by the presiding officer, from the date a copy of the motion was served. The time fixed for hearing or nonoral submission shall be not less than 20 days after the filing of the motion, unless a shorter time is ordered by the presiding officer. A summary judgment order rendered on all issues in a contested case is subject to rehearing pursuant to rule 4.28(17A) and appeal pursuant to rule 4.27(17A).

**751—4.16(17A) Prehearing conference.**

**4.16(1)** Any party may request a prehearing conference. A written request for prehearing conference or an order for prehearing conference on the presiding officer's own motion shall be filed not less than seven days prior to the hearing date. A prehearing conference shall be scheduled not less than three business days prior to the hearing date.

Written notice of the prehearing conference shall be given by the executive director to all parties. For good cause the presiding officer may permit variances from this rule.

**4.16(2)** Each party shall bring to the prehearing conference:

a. A final list of the witnesses who the party anticipates will testify at hearing. Witnesses not listed may be excluded from testifying unless there was good cause for the failure to include their names; and

b. A final list of exhibits which the party anticipates will be introduced at hearing. Exhibits other than rebuttal exhibits that are not listed may be excluded from admission into evidence unless there was good cause for the failure to include them.

c. Witness or exhibit lists may be amended subsequent to the prehearing conference within the time limits established by the presiding officer at the prehearing conference. Any such amendments must be served on all parties.

**4.16(3)** In addition to the requirements of subrule 4.16(2), the parties at a prehearing conference may:

a. Enter into stipulations of law or fact;

b. Enter into stipulations on the admissibility of exhibits;

c. Identify matters which the parties intend to request be officially noticed;

d. Enter into stipulations for waiver of any provision of law; and

e. Consider any additional matters which will expedite the hearing.

**4.16(4)** Prehearing conferences shall be conducted by telephone unless otherwise ordered. Parties shall exchange and receive witness and exhibit lists in advance of a telephone prehearing conference.

**751—4.17(17A) Continuances.** Unless otherwise provided, applications for continuances shall be made to the presiding officer.

**4.17(1)** A written application for a continuance shall:

a. Be made at the earliest possible time and no less than seven days before the hearing except in case of unanticipated emergencies;

b. State the specific reasons for the request; and

c. Be signed by the requesting party or the party's representative.

An oral application for a continuance may be made if the presiding officer waives the requirement for a written motion. However, a party making such an oral application for a continuance must confirm that request by written application within five days after the oral request unless that requirement is waived by the presiding officer. No application for continuance shall be made or granted without notice to all parties except in an emergency where notice is not feasible. The commission may waive notice of such requests for a particular case or an entire class of cases.

**4.17(2)** In determining whether to grant a continuance, the presiding officer may consider:

a. Prior continuances;

b. The interests of all parties;

c. The likelihood of informal settlement;

d. The existence of an emergency;

e. Any objection;

f. Any applicable time requirements;

g. The existence of a conflict in the schedules of counsel, parties, or witnesses;

h. The timeliness of the request; and

i. Other relevant factors.

The presiding officer may require documentation of any grounds for continuance.

**751—4.18(17A) Withdrawals.** A party requesting a contested case proceeding may withdraw that request prior to the hearing only in accordance with commission rules. Unless otherwise provided, a withdrawal shall be with prejudice.

**751—4.19(17A) Intervention.**

**4.19(1)** Motion. A motion for leave to intervene in a contested case proceeding shall state the grounds for the proposed intervention, the position and interest of the proposed intervenor, and the possible impact of intervention on the proceeding. A proposed answer or petition in intervention shall be attached to the motion. Any party may file a response within 14 days of service of the motion to intervene unless the time period is extended or shortened by the presiding officer.

**4.19(2)** When filed. Motion for leave to intervene shall be filed as early in the proceeding as possible to avoid adverse impact on existing parties or the conduct of the proceeding. Unless otherwise ordered, a motion for leave to intervene shall be filed before the prehearing conference, if any, or at least 20 days before the date scheduled for hearing. Any later motion must contain a statement of good cause for the failure to file in a timely manner. Unless inequitable or unjust, an intervenor shall be bound by any agreement, arrangement, or other matter previously raised in the case. Requests by untimely intervenors for continuances which would delay the proceeding will ordinarily be denied.

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**4.19(3)** Grounds for intervention. The movant shall demonstrate that (a) intervention would not unduly prolong the proceedings or otherwise prejudice the rights of existing parties; (b) the movant is likely to be aggrieved or adversely affected by a final order in the proceeding; and (c) the interests of the movant are not adequately represented by existing parties.

**4.19(4)** Effect of intervention. If appropriate, the presiding officer may order consolidation of the petitions and briefs of different parties whose interests are aligned with each other and limit the number of representatives allowed to participate actively in the proceedings. A person granted leave to intervene is a party to the proceeding. The order granting intervention may restrict the issues that may be raised by the intervenor or otherwise condition the intervenor's participation in the proceeding.

**751—4.20(17A) Hearing procedures.**

**4.20(1)** The presiding officer presides at the hearing, and may rule on motions, require briefs, issue a proposed decision, and issue such orders and rulings as will ensure the orderly conduct of the proceedings.

**4.20(2)** All objections shall be timely made and stated on the record.

**4.20(3)** Parties have the right to participate or to be represented in all hearings or prehearing conferences related to their case. Partnerships, corporations, or associations may be represented by any member, officer, director, or duly authorized agent. Any party may be represented by an attorney or another person authorized by law.

**4.20(4)** Subject to terms and conditions prescribed by the presiding officer, parties have the right to introduce evidence on issues of material fact, cross-examine witnesses present at the hearing as necessary for a full and true disclosure of the facts, present evidence in rebuttal, and submit briefs and engage in oral argument.

**4.20(5)** The presiding officer shall maintain the decorum of the hearing and may refuse to admit or may expel anyone whose conduct is disorderly.

**4.20(6)** Witnesses may be sequestered during the hearing.

**4.20(7)** The presiding officer shall conduct the hearing in the following manner:

a. The presiding officer shall give an opening statement briefly describing the nature of the proceedings;

b. The parties shall be given an opportunity to present opening statements;

c. Parties shall present their cases in the sequence determined by the presiding officer;

d. Each witness shall be sworn or affirmed by the presiding officer or the court reporter, and be subject to examination and cross-examination. The presiding officer may limit questioning in a manner consistent with law;

e. When all parties and witnesses have been heard, parties may be given the opportunity to present final arguments.

**751—4.21(17A) Evidence.**

**4.21(1)** The presiding officer shall rule on admissibility of evidence and may, where appropriate, take official notice of facts in accordance with all applicable requirements of law.

**4.21(2)** Stipulation of facts is encouraged. The presiding officer may make a decision based on stipulated facts.

**4.21(3)** Evidence in the proceeding shall be confined to the issues as to which the parties received notice prior to the hearing unless the parties waive their right to such notice or the presiding officer determines that good cause justifies expansion of the issues. If the presiding officer decides to ad-

mit evidence on issues outside the scope of the notice over the objection of a party who did not have actual notice of those issues, that party, upon timely request, shall receive a continuance sufficient to amend pleadings and to prepare on the additional issue.

**4.21(4)** The party seeking admission of an exhibit must provide opposing parties with an opportunity to examine the exhibit prior to the ruling on its admissibility. Copies of documents should normally be provided to opposing parties.

All exhibits admitted into evidence shall be appropriately marked and be made part of the record.

**4.21(5)** Any party may object to specific evidence or may request limits on the scope of any examination or cross-examination. Such an objection shall be accompanied by a brief statement of the grounds upon which it is based. The objection, the ruling on the objection, and the reasons for the ruling shall be noted in the record. The presiding officer may rule on the objection at the time it is made or may reserve a ruling until the written decision.

**4.21(6)** Whenever evidence is ruled inadmissible, the party offering that evidence may submit an offer of proof on the record. The party making the offer of proof for excluded oral testimony shall briefly summarize the testimony or, with permission of the presiding officer, present the testimony. If the excluded evidence consists of a document or exhibit, it shall be marked as part of an offer of proof and inserted in the record.

**751—4.22(17A) Default.**

**4.22(1)** If a party fails to appear or participate in a contested case proceeding after proper service of notice, the presiding officer may, if no adjournment is granted, enter a default decision or proceed with the hearing and render a decision in the absence of the party.

**4.22(2)** Where appropriate and not contrary to law, any party may move for default against a party who has requested the contested case proceeding and has failed to file a required pleading or has failed to appear after proper service.

**4.22(3)** Default decisions or decisions rendered on the merits after a party has failed to appear or participate in a contested case proceeding become final commission action unless, within 15 days after the date of notification or mailing of the decision, a motion to vacate is filed and served on all parties or an appeal of a decision on the merits is timely initiated within the time provided by rule 4.27(17A). A motion to vacate must state all facts relied upon by the moving party which establish that good cause existed for that party's failure to appear or participate at the contested case proceeding. Each fact so stated must be substantiated by at least one sworn affidavit of a person with personal knowledge of each such fact, which affidavit(s) must be attached to the motion.

**4.22(4)** The time for further appeal of a decision for which a timely motion to vacate has been filed is stayed pending a decision on the motion to vacate.

**4.22(5)** Properly substantiated and timely filed motions to vacate shall be granted only for good cause shown. The burden of proof as to good cause is on the moving party. Adverse parties shall have ten days to respond to a motion to vacate. Adverse parties shall be allowed to conduct discovery as to the issue of good cause and to present evidence on the issue prior to a decision on the motion, if a request to do so is included in that party's response.

**4.22(6)** "Good cause" for purposes of this rule shall have the same meaning as "good cause" for setting aside a default judgment under Iowa Rule of Civil Procedure 236.

**4.22(7)** A decision denying a motion to vacate is subject to further appeal within the time limit allowed for further ap-

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peal of a decision on the merits in the contested case proceeding. A decision granting a motion to vacate is subject to interlocutory appeal by the adverse party pursuant to rule 4.25(17A).

**4.22(8)** If a motion to vacate is granted and no timely interlocutory appeal has been taken, the presiding officer shall issue another notice of hearing and the contested case shall proceed accordingly.

**4.22(9)** A default decision may award any relief consistent with the request for relief made in the petition and embraced in its issues but, unless the defaulting party has appeared, it cannot exceed the relief demanded.

**4.22(10)** A default decision may provide either that the default decision is to be stayed pending a timely motion to vacate or that the default decision is to take effect immediately, subject to a request for stay under rule 4.29(17A).

**751—4.23(17A) Ex parte communication.**

**4.23(1)** Prohibited communications. Unless required for the disposition of ex parte matters specifically authorized by statute, following issuance of the notice of hearing, there shall be no communication, directly or indirectly, between the presiding officer and any party or representative of any party or any other person with a direct or indirect interest in such case in connection with any issue of fact or law in the case except upon notice and opportunity for all parties to participate. This does not prohibit persons jointly assigned such tasks from communicating with each other. Nothing in this provision is intended to preclude the presiding officer from communicating with members of the commission or seeking the advice or help of persons other than those with a personal interest in, or those engaged in personally investigating as defined in subrule 4.9(2), prosecuting, or advocating in, either the case under consideration or a pending factually related case involving the same parties as long as those persons do not directly or indirectly communicate to the presiding officer any ex parte communications they have received of a type that the presiding officer would be prohibited from receiving or that furnish, augment, diminish, or modify the evidence in the record.

**4.23(2)** Prohibitions on ex parte communications commence with the issuance of the notice of hearing in a contested case and continue for as long as the case is pending.

**4.23(3)** Written, oral or other forms of communication are "ex parte" if made without notice and opportunity for all parties to participate.

**4.23(4)** To avoid prohibited ex parte communications, notice must be given in a manner reasonably calculated to give all parties a fair opportunity to participate. Notice of written communications shall be provided in compliance with rule 4.12(17A) and may be supplemented by telephone, facsimile, electronic mail or other means of notification. Where permitted, oral communications may be initiated through conference telephone call including all parties or their representatives.

**4.23(5)** Persons who jointly act as presiding officer in a pending contested case may communicate with each other without notice or opportunity for parties to participate.

**4.23(6)** The executive director or other persons may be present in deliberations or otherwise advise the presiding officer without notice or opportunity for parties to participate as long as they are not disqualified from participating in the making of a proposed or final decision under any provision of law and they comply with subrule 4.23(1).

**4.23(7)** Communications with the presiding officer involving uncontested scheduling or procedural matters do not require notice or opportunity for parties to participate. Par-

ties should notify other parties prior to initiating such contact with the presiding officer when feasible, and shall notify other parties when seeking to continue hearings or other deadlines pursuant to rule 4.17(17A).

**4.23(8)** Disclosure of prohibited communications. A presiding officer who receives a prohibited ex parte communication during the pendency of a contested case must initially determine if the effect of the communication is so prejudicial that the presiding officer should be disqualified. If the presiding officer determines that disqualification is warranted, a copy of any prohibited written communication, all written responses to the communication, a written summary stating the substance of any prohibited oral or other communication not available in written form for disclosure, all responses made, and the identity of each person from whom the presiding officer received a prohibited ex parte communication shall be submitted for inclusion in the record under seal by protective order. If the presiding officer determines that disqualification is not warranted, such documents shall be submitted for inclusion in the record and served on all parties. Any party desiring to rebut the prohibited communication must be allowed the opportunity to do so upon written request filed within ten days after notice of the communication.

**4.23(9)** Promptly after being assigned to serve as presiding officer at any stage in a contested case proceeding, a presiding officer shall disclose to all parties material factual information received through ex parte communication prior to such assignment unless the factual information has already been or shortly will be disclosed pursuant to Iowa Code section 17A.13(2) or through discovery. Factual information contained in an investigative report or similar document need not be separately disclosed by the presiding officer as long as such documents have been or will shortly be provided to the parties.

**4.23(10)** The presiding officer may render a proposed or final decision imposing appropriate sanctions for violations of this rule including default, a decision against the offending party, censure, or suspension, or revocation of the privilege to practice before the commission. Violation of ex parte communication prohibitions by commission personnel shall be reported to the executive director for possible sanctions including censure, suspension, dismissal, or other disciplinary action.

**751—4.24(17A) Recording costs.** Upon request, the commission shall provide a copy of the whole or any portion of the record at cost. The cost of preparing a copy of the record or of transcribing the hearing record shall be paid by the requesting party.

Parties who request that a hearing be recorded by certified shorthand reporters rather than by electronic means shall bear the cost of that recordation, unless otherwise provided by law.

**751—4.25(17A) Interlocutory appeals.** Upon written request of a party or on its own motion, the commission may review an interlocutory order of the presiding officer. In determining whether to do so, the commission shall weigh the extent to which its granting the interlocutory appeal would expedite final resolution of the case and the extent to which review of that interlocutory order by the commission at the time it reviews the proposed decision of the presiding officer would provide an adequate remedy. Any request for interlocutory review must be filed within 14 days of issuance of the challenged order, but no later than the time for compliance with the order or the date of hearing, whichever is first.

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**751—4.26(17A) Posthearing procedures and orders.**

**4.26(1)** Filing by parties of briefs and proposed findings. The presiding officer may ask the parties to submit proposed findings and conclusions of law and a proposed order or briefs. Copies of the submission shall be served on all parties. The submission schedule, including waiver or briefs, shall be determined at the close of the hearing.

**4.26(2)** Final decision or order.

a. When a quorum of the entire commission presides over the reception of evidence at the hearing, its decision is a final decision. The decision shall be in writing and shall include findings of fact and conclusions of law in conformance with Iowa Code chapter 17A.

b. In a contested case in which the hearing is held before an administrative law judge or a panel of commission members constituting less than a quorum of the board, the presiding officer or panel shall render a proposed decision. The proposed decision shall be in writing and shall include findings of fact and conclusions of law in conformance with Iowa Code chapter 17A. The proposed decision becomes the final decision of the commission without further proceedings unless there is an appeal to, or review on motion of, the commission within 30 days.

**4.26(3)** Decisions and orders.

a. By whom prepared. The presiding officer who presided at the reception of evidence shall prepare a proposed or final decision or order in each case. Findings of fact shall be prepared by the presiding officer at the reception of the evidence in a case unless the officer becomes unavailable. If the officer is unavailable, the findings of fact may be prepared by another person qualified to be a presiding officer who has read the record, unless demeanor of witnesses is a substantial factor. If demeanor is a substantial factor and the presiding officer is unavailable, the portions of the hearing involving demeanor shall be heard again or the case shall be dismissed.

b. Content of decision or order. The proposed or final decision or order shall:

(1) Be in writing or stated in the record.

(2) Include findings of fact. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of underlying facts supporting the findings. If a party submitted proposed finding of fact in accordance with subrule 4.26(1), the decision or order shall include a ruling upon each proposed finding.

(3) Include conclusions of law, supported by cited authority or reasoned opinion.

c. Delivery. A copy of the proposed decision or order shall be delivered to the parties either by personal service or by certified mail, return receipt requested.

**751—4.27(17A) Appeals and review.**

**4.27(1)** Appeal by party. Any adversely affected party may appeal a proposed decision to the commission within 30 days after issuance of the proposed decision.

**4.27(2)** Review. The commission member of the commission may initiate review of a proposed decision on its own motion at any time within 30 days following the issuance of such a decision.

**4.27(3)** Notice of appeal. An appeal of a proposed decision is initiated by filing a timely notice of appeal with the commission. The notice of appeal must be signed by the appealing party or a representative of that party and contain a certificate of service. If a commission member or the commission initiates review of a proposed decision, the executive director shall mail a notice of review to all parties. The notice of appeal or the notice of review shall specify:

a. The parties initiating the appeal;

b. The proposed decision or order appealed from;

c. The specific findings or conclusions to which exception is taken and any other exceptions to the decision or order;

d. The relief sought;

e. The grounds for relief.

**4.27(4)** Requests to present additional evidence. A party may request the taking of additional evidence only by establishing that the evidence is material, that good cause existed for the failure to present the evidence at the hearing, and that the party has not waived the right to present the evidence. A written request to present additional evidence must be filed with the notice of appeal or, by a nonappealing party, within 14 days of service of the notice of appeal. The commission may remand a case to the presiding officer for further hearing or may itself preside at the taking of additional evidence.

**4.27(5)** Scheduling. The commission shall issue a schedule for consideration of the appeal.

**4.27(6)** Briefs and arguments. Unless otherwise ordered, within 20 days of the notice of appeal or order for review, each appealing party may file exceptions and briefs. Within 20 days thereafter, any party may file a responsive brief. Briefs shall cite any applicable legal authority and specify relevant portions of the record in that proceeding. Written requests to present oral argument shall be filed with the briefs. The commission may resolve the appeal on the briefs or provide an opportunity for oral argument. The commission may shorten or extend the briefing period as appropriate.

**751—4.28(17A) Applications for rehearing.**

**4.28(1)** By whom filed. Any party to a contested case proceeding may file an application for rehearing from a final order.

**4.28(2)** Content of application. The application for rehearing shall state on whose behalf it is filed, the specific grounds for rehearing, and the relief sought. In addition, the application shall state whether the applicant desires reconsideration of all or part of the commission decision on the existing record and whether, on the basis of the grounds enumerated in subrule 4.27(4), the applicant requests an opportunity to submit additional evidence.

**4.28(3)** Time of filing. The application shall be filed with the commission within 20 days after issuance of the final decision.

**4.28(4)** Notice to other parties. A copy of the application shall be timely mailed by the applicant to all parties of record not joining therein. If the application does not contain a certificate of service, the commission shall serve copies on all parties.

**4.28(5)** Disposition. Any application for a rehearing shall be deemed denied unless the commission grants the application within 20 days after its filing.

**751—4.29(17A) Stays of commission actions.****4.29(1)** When available.

a. Any party to a contested case proceeding may petition the commission for a stay of an order issued in that proceeding or for other temporary remedies, pending review by the commission. The petition shall be filed with the notice of appeal and shall state the reasons justifying a stay or other temporary remedy. The commission may rule on the stay or authorize the presiding officer to do so.

b. Any party to a contested case proceeding may petition the commission for a stay or other temporary remedies pending judicial review, of all or part of that proceeding. The

## TELECOMMUNICATIONS AND TECHNOLOGY COMMISSION, IOWA[751](cont'd)

petition shall state the reasons justifying a stay or other temporary remedy.

**4.29(2)** When granted. In determining whether to grant a stay, the presiding officer or commission shall consider the factors listed in 1998 Iowa Acts, chapter 1202, section 23(5c).

**4.29(3)** Vacation. A stay may be vacated by the issuing authority upon application of the commission or any other party.

**751—4.30(17A) No factual dispute contested cases.** If the parties agree that no dispute of material fact exists as to a matter that would be a contested case if such a dispute of fact existed, the parties may present all relevant admissible evidence either by stipulation or otherwise as agreed by the parties, without necessity for the production of evidence at an evidentiary hearing. If such agreement is reached, a jointly submitted schedule detailing the method and timetable for submission of the record, briefs and oral argument should be submitted to the presiding officer for approval as soon as practicable. If the parties cannot agree, any party may file and serve a motion for summary judgment pursuant to the rules governing such motions.

**751—4.31(17A) Emergency adjudicative proceedings.**

**4.31(1)** Necessary emergency action. To the extent necessary to prevent or avoid immediate danger to the public health, safety, or welfare, and consistent with the Constitution and other provisions of law, the commission may issue a written order in compliance with 1998 Iowa Acts, chapter 1202, section 21, to suspend a license in whole or in part, order the cessation of any continuing activity, order affirmative action, or take other action within the jurisdiction of the commission by emergency adjudicative order. Before issuing an emergency adjudicative order the commission shall consider factors including, but not limited to, the following:

- a. Whether there has been a sufficient factual investigation to ensure that the commission is proceeding on the basis of reliable information;
- b. Whether the specific circumstances which pose immediate danger to the public health, safety or welfare have been identified and determined to be continuing;
- c. Whether the person required to comply with the emergency adjudicative order may continue to engage in other activities without posing immediate danger to the public health, safety or welfare;
- d. Whether imposition of monitoring requirements or other interim safeguards would be sufficient to protect the public health, safety or welfare; and
- e. Whether the specific action contemplated by the commission is necessary to avoid the immediate danger.

**4.31(2)** Issuance of order.

a. An emergency adjudicative order shall contain findings of fact, conclusions of law, and policy reasons to justify the determination of an immediate danger in the commission's decision to take immediate action.

b. The written emergency adjudicative order shall be immediately delivered to persons who are required to comply with the order by utilizing one or more of the following procedures:

- (1) Personal delivery;
- (2) Certified mail, return receipt requested, to the last address on file with the commission;
- (3) Certified mail to the last address on file with the commission;

(4) First-class mail to the last address on file with the commission; or

(5) Fax. Fax may be used as the sole method of delivery if the person required to comply with the order has filed a written request that commission orders be sent by fax and has provided a fax number for that purpose.

c. To the degree practicable, the commission shall select the procedure for providing written notice that best ensures prompt, reliable delivery.

**4.31(3)** Oral notice. Unless the written emergency adjudicative order is provided by personal delivery on the same day that the order issues, the commission shall make reasonable immediate efforts to contact by telephone the persons who are required to comply with the order.

**4.31(4)** Completion of proceedings. After the issuance of an emergency adjudicative order, the commission shall proceed as quickly as feasible to complete any proceedings that would be required if the matter did not involve an immediate danger.

Issuance of a written emergency adjudicative order shall include notification of the date on which commission proceedings are scheduled for completion. After issuance of an emergency adjudicative order, continuance of further commission proceedings to a later date will be granted only in compelling circumstances upon application in writing.

**751—4.32(17A,8D) Informal procedure prior to hearing.**

Any person who desires to pursue informal settlement of any contested case may request a meeting with appropriate staff. The request should be made in writing to the executive director, setting forth a concise statement of the circumstances giving rise to the controversy, the text or citation to any applicable law, commission rule, or decision, and a statement of the settlement proposed. A request for informal settlement should be received by the executive director not less than 15 days before the board meeting at which it is to be considered. The executive director shall schedule consideration of the request at the next regular board meeting occurring more than 15 days after the request for an informal settlement is made. Not more than 10 days after the commission meeting at which the request is scheduled for consideration, the executive director will notify the petitioner in writing of the commission's disposition of the request. If the commission determines that a conference is appropriate, the party will be notified when, where, and with whom such a conference is to be held. The terms of any settlement agreed to by the parties shall be embodied in a written stipulation. Upon receipt of the request, all formal contested case procedures are stayed, except in the case of emergency orders as provided in rule 4.31(17A). If informal settlement is unsuccessful, formal contested case proceedings may be instituted in accordance with rule 4.5(17A).

These rules are intended to implement Iowa Code chapter 8D and chapter 17A as amended by 1998 Iowa Acts, chapter 1202.

ITEM 3. Adopt new 751—Chapter 18 as follows:

**CHAPTER 18**  
**PROCEDURE FOR RULE MAKING**

**751—18.1(17A) Applicability.** Except to the extent otherwise expressly provided by statute, all rules adopted by the commission are subject to the provisions of Iowa Code chapter 17A, the Iowa administrative procedure Act, and the provisions of this chapter.

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**751—18.2(17A) Advice on possible rules before notice of proposed rule adoption.** In addition to seeking information by other methods, the commission may, before publication of a Notice of Intended Action under Iowa Code section 17A.4(1)“a,” solicit comments from the public on a subject matter of possible rule making by the commission by causing notice to be published in the Iowa Administrative Bulletin of the subject matter and indicating where, when, and how persons may comment.

**751—18.3(17A) Public rule-making docket.**

**18.3(1)** Docket maintained. The commission shall maintain a current public rule-making docket.

**18.3(2)** Anticipated rule making. The rule-making docket shall list each anticipated rule-making proceeding. A rule-making proceeding is deemed “anticipated” from the time a draft of proposed rules is distributed for internal discussion within the commission. For each anticipated rule-making proceeding the docket shall contain a listing of the precise subject matter which may be submitted for consideration by the commission for subsequent proposal under the provisions of Iowa Code section 17A.4(1)“a,” the name and address of commission personnel with whom persons may communicate with respect to the matter, and an indication of the present status within the commission of that possible rule. The commission may also include in the docket other subjects upon which public comment is desired.

**18.3(3)** Pending rule-making proceedings. The rule-making docket shall list each pending rule-making proceeding. A rule-making proceeding is pending from the time it is commenced, by publication in the Iowa Administrative Bulletin of a Notice of Intended Action pursuant to Iowa Code section 17A.4(1)“a,” to the time it is terminated, by publication of a Notice of Termination in the Iowa Administrative Bulletin or the rule becoming effective. For each rule-making proceeding, the docket shall indicate:

- a. The subject matter of the proposed rule;
- b. A citation to all published notices relating to the proceeding;
- c. Where written submissions on the proposed rule may be inspected;
- d. The time during which written submissions may be made;
- e. The names of persons who have made written requests for an opportunity to make oral presentations on the proposed rule, where those requests may be inspected, and where and when oral presentations may be made;
- f. Whether a written request for the issuance of a regulatory analysis, or a concise statement of reasons, has been filed, whether such an analysis or statement or a fiscal impact statement has been issued, and where any such written request, analysis, or statement may be inspected;
- g. The current status of the proposed rule and any commission determinations with respect thereto;
- h. Any known timetable for commission decisions or other action in the proceeding;
  - i. The date of the rule’s adoption;
  - j. The date of the rule’s filing, indexing, and publication;
  - k. The date on which the rule will become effective; and
  - l. Where the rule-making record may be inspected.

**751—18.4(17A) Notice of proposed rule making.**

**18.4(1)** Contents. At least 35 days before the adoption of a rule the commission shall cause Notice of Intended Action to be published in the Iowa Administrative Bulletin. The Notice of Intended Action shall include:

- a. A brief explanation of the purpose of the proposed rule;
- b. The specific legal authority for the proposed rule;
- c. Except to the extent impracticable, the text of the proposed rule;
- d. Where, when, and how persons may present their views on the proposed rule; and
- e. Where, when, and how persons may demand an oral proceeding on the proposed rule if the notice does not already provide for one.

Where inclusion of the complete text of a proposed rule in the Notice of Intended Action is impracticable, the commission shall include in the notice a statement fully describing the specific subject matter of the omitted portion of the text of the proposed rule, the specific issues to be addressed by that omitted text of the proposed rule, and the range of possible choices being considered by the commission for the resolution of each of those issues.

**18.4(2)** Incorporation by reference. A proposed rule may incorporate other materials by reference only if it complies with all of the requirements applicable to the incorporation by reference of other materials in an adopted rule that are contained in subrule 18.12(2) of this chapter.

**18.4(3)** Copies of notices. Persons desiring to receive copies of future Notices of Intended Action by subscription must file with the commission a written request indicating the name and address to which such notices should be sent. Within seven days after submission of a Notice of Intended Action to the administrative rules coordinator for publication in the Iowa Administrative Bulletin, the commission shall mail or electronically transmit a copy of that notice to subscribers who have filed a written request for either mailing or electronic transmittal with the commission for Notices of Intended Action. The written request shall be accompanied by payment of the subscription price which may cover the full cost of the subscription service, including its administrative overhead and the cost of copying and mailing the Notices of Intended Action for a period of six months.

**751—18.5(17A) Public participation.**

**18.5(1)** Written comments. For at least 20 days after publication of the Notice of Intended Action, persons may submit argument, data, and views, in writing, on the proposed rule. Such written submissions should identify the proposed rule to which they relate and should be submitted to the Executive Director, ICN, Camp Dodge, W4 Railroad Avenue, P.O. Box 587, Johnston, Iowa 50131-0587, or the person designated in the Notice of Intended Action.

**18.5(2)** Oral proceedings. The commission may, at any time, schedule an oral proceeding on a proposed rule. The commission shall schedule an oral proceeding on a proposed rule if, within 20 days after the published Notice of Intended Action, a written request for an opportunity to make oral presentations is submitted to the commission by the administrative rules review committee, a governmental subdivision, a commission, an association having not less than 25 members, or at least 25 persons. That request must also contain the following additional information:

1. A request by one or more individual persons must be signed by each of them and include the address and telephone number of each of them.

2. A request by an association must be signed by an officer or designee of the association and must contain a statement that the association has at least 25 members and the address and telephone number of the person signing that request.

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3. A request by a commission or governmental subdivision must be signed by an official having authority to act on behalf of the entity and must contain the address and telephone number of the person signing that request.

**18.5(3) Conduct of oral proceedings.**

a. **Applicability.** This subrule applies only to those oral rule-making proceedings in which an opportunity to make oral presentations is authorized or required by Iowa Code section 17A.4(1)"b" as amended by 1998 Iowa Acts, chapter 1202, section 8, or this chapter.

b. **Scheduling and notice.** An oral proceeding on a proposed rule may be held in one or more locations and shall not be held earlier than 20 days after notice of its location and time is published in the Iowa Administrative Bulletin. That notice shall also identify the proposed rule by ARC number and citation to the Iowa Administrative Bulletin.

c. **Presiding officer.** The commission, a member of the commission, or another person designated by the commission who will be familiar with the substance of the proposed rule, shall preside at the oral proceeding on a proposed rule. If the commission does not preside, the presiding officer shall prepare a memorandum for consideration by the commission summarizing the contents of the presentations made at the oral proceeding unless the commission determines that such a memorandum is unnecessary because the commission will personally listen to or read the entire transcript of the oral proceeding.

d. **Conduct of proceeding.** At an oral proceeding on a proposed rule, persons may make oral statements and make documentary and physical submissions, which may include data, views, comments or arguments concerning the proposed rule. Persons wishing to make oral presentations at such a proceeding are encouraged to notify the commission at least one business day prior to the proceeding and indicate the general subject of their presentations. At the proceeding, those who participate shall indicate their names and addresses, identify any persons or organizations they may represent, and provide any other information relating to their participation deemed appropriate by the presiding officer. Oral proceedings shall be open to the public and shall be recorded by stenographic or electronic means.

(1) At the beginning of the oral proceeding the presiding officer shall give a brief synopsis of the proposed rule, a statement of the statutory authority for the proposed rule, and the reasons for the commission decision to propose the rule. The presiding officer may place time limitations on individual oral presentations when necessary to ensure the orderly and expeditious conduct of the oral proceeding. To encourage joint oral presentations and to avoid repetition, additional time may be provided for persons whose presentations represent the views of other individuals as well as their own views.

(2) Persons making oral presentations are encouraged to avoid restating matters which have already been submitted in writing.

(3) To facilitate the exchange of information, the presiding officer may, where time permits, open the floor to questions or general discussion.

(4) The presiding officer shall have the authority to take any reasonable action necessary for the orderly conduct of the meeting.

(5) Physical and documentary submissions presented by participants in the oral proceeding shall be submitted to the presiding officer. Such submissions become the property of the commission.

(6) The oral proceeding may be continued by the presiding officer to a later time without notice other than by announcement at the hearing.

(7) Participants in an oral proceeding shall not be required to take an oath or to submit to cross-examination. However, the presiding officer in an oral proceeding may question participants and permit the questioning of participants by other participants about any matter relating to that rule-making proceeding, including any prior written submissions made by those participants in that proceeding; but no participant shall be required to answer any question.

(8) The presiding officer in an oral proceeding may permit rebuttal statements and request the filing of written statements subsequent to the adjournment of the oral presentations.

**18.5(4) Additional information.** In addition to receiving written comments and oral presentations on a proposed rule according to the provisions of this rule, the commission may obtain information concerning a proposed rule through any other lawful means deemed appropriate under the circumstances.

**18.5(5) Accessibility.** The commission shall schedule oral proceedings in rooms accessible to and functional for persons with physical disabilities. Persons who have special requirements should contact the Executive Director, ICN, Camp Dodge, W4 Railroad Avenue, P.O. Box 587, Johnston, Iowa 50131-0587, telephone (515)323-4692, in advance to arrange access or other needed services.

**751—18.6(17A) Regulatory analysis.**

**18.6(1) Definition of small business.** A "small business" is defined in 1998 Iowa Acts, chapter 1202, section 10(7).

**18.6(2) Mailing list.** Small businesses or organizations of small businesses may be registered on the commission's small business impact list by making a written application addressed to the Executive Director, ICN, Camp Dodge, W4 Railroad Avenue, P.O. Box 587, Johnston, Iowa 50131-0587. The application for registration shall state:

a. The name of the small business or organization of small businesses;

b. Its address;

c. The name of a person authorized to transact business for the applicant;

d. A description of the applicant's business or organization. An organization representing 25 or more persons who qualify as a small business shall indicate that fact.

e. Whether the registrant desires copies of Notices of Intended Action at cost, or desires advance notice of the subject of all or some specific category of proposed rule making affecting small business.

The commission may at any time request additional information from the applicant to determine whether the applicant is qualified as a small business or as an organization of 25 or more small businesses. The commission may periodically send a letter to each registered small business or organization, business or organization of small businesses asking whether that business or organization wishes to remain on the registration list. The name of a small business or organization of small businesses will be removed from the list if a negative response is received, or if no response is received within 30 days after the letter is sent.

**18.6(3) Time of mailing.** Within seven days after submission of a Notice of Intended Action to the administrative rules coordinator for publication in the Iowa Administrative Bulletin, the commission shall mail to all registered small businesses or organizations of small businesses, in accor-

## TELECOMMUNICATIONS AND TECHNOLOGY COMMISSION, IOWA[751](cont'd)

dance with their request, either a copy of the Notice of Intended Action or notice of the subject of that proposed rule making. In the case of a rule that may have an impact on small business adopted in reliance upon Iowa Code section 17A.4(2), the commission shall mail notice of the adopted rule to registered businesses or organizations prior to the time the adopted rule is published in the Iowa Administrative Bulletin.

**18.6(4)** Qualified requesters for regulatory analysis—economic impact. The commission shall issue a regulatory analysis of a proposed rule that conforms to the requirements of 1998 Iowa Acts, chapter 1202, section 10(2a), after a proper request from:

- a. The administrative rules coordinator;
- b. The administrative rules review committee.

**18.6(5)** Qualified requesters for regulatory analysis—business impact. The commission shall issue a regulatory analysis of a proposed rule that conforms to the requirements of 1998 Iowa Acts, chapter 1202, section 10(2b), after a proper request from:

- a. The administrative rules review committee;
- b. The administrative rules coordinator;
- c. At least 25 or more persons who sign the request provided that each represents a different small business;
- d. An organization representing at least 25 small businesses. That organization shall list the name, address and telephone number of not less than 25 small businesses it represents.

**18.6(6)** Time period for analysis. Upon receipt of a timely request for a regulatory analysis the commission shall adhere to the time lines described in 1998 Iowa Acts, chapter 1202, section 10(4).

**18.6(7)** Contents of request. A request for a regulatory analysis is made when it is mailed or delivered to the commission. The request shall be in writing and satisfy the requirements of 1998 Iowa Acts, chapter 1202, section 10(1).

**18.6(8)** Contents of concise summary. The contents of the concise summary shall conform to the requirements of 1998 Iowa Acts, chapter 1202, section 10(4,5).

**18.6(9)** Publication of a concise summary. The commission shall make available to the maximum extent feasible, copies of the published summary in conformance with 1998 Iowa Acts, chapter 1202, section 10(5).

**18.6(10)** Regulatory analysis contents—rules review committee or rules coordinator. When a regulatory analysis is issued in response to a written request from the administrative rules review committee, or the administrative rules coordinator, the regulatory analysis shall conform to the requirements of 1998 Iowa Acts, chapter 1202, section 10(2a), unless a written request expressly waives one or more of the items listed in the section.

**18.6(11)** Regulatory analysis contents—substantial impact on small business. When a regulatory analysis is issued in response to a written request from the administrative rules review committee, the administrative rules coordinator, at least 25 persons signing that request who each qualify as a small business or by an organization representing at least 25 small businesses, the regulatory analysis shall conform to the requirements of 1998 Iowa Acts, chapter 1202, section 10(2b).

#### **751—18.7(17A,25B) Fiscal impact statement.**

**18.7(1)** A proposed rule that mandates additional combined expenditures exceeding \$100,000 by all affected political subdivisions, or agencies and entities which contract with political subdivisions to provide services must be accompanied by a fiscal impact statement outlining the costs

associated with the rule. A fiscal impact statement must satisfy the requirements of Iowa Code section 25B.6.

**18.7(2)** If the commission determines at the time it adopts a rule that the fiscal impact statement upon which the rule is based contains errors, the commission shall, at the same time, issue a corrected fiscal impact statement and publish the corrected fiscal impact statement in the Iowa Administrative Bulletin.

#### **751—18.8(17A) Time and manner of rule adoption.**

**18.8(1)** Time of adoption. The commission shall not adopt a rule until the period for making written submissions and oral presentations has expired. Within 180 days after the later of the publication of the Notice of Intended Action, or the end of oral proceedings thereon, the commission shall adopt a rule pursuant to the rule-making proceeding or terminate the proceeding by publication of a notice to that effect in the Iowa Administrative Bulletin.

**18.8(2)** Consideration of public comment. Before the adoption of a rule, the commission shall consider fully all of the written submissions and oral submissions received in that rule-making proceeding or any memorandum summarizing such oral submissions, and any regulatory analysis, or fiscal impact statement issued in that rule-making proceeding.

**18.8(3)** Reliance on commission expertise. Except as otherwise provided by law, the commission may use its own experience, technical competence, specialized knowledge, and judgment in the adoption of a rule.

#### **751—18.9(17A) Variance between adopted rule and published notice of proposed rule adoption.**

**18.9(1)** The commission shall not adopt a rule that differs from the rule proposed in the Notice of Intended Action on which the rule is based unless:

- a. The differences are within the scope of the subject matter announced in the Notice of Intended Action and are in character with the issues raised in that notice; and
- b. The differences are a logical outgrowth of the contents of that Notice of Intended Action and the comments submitted in response thereto; and
- c. The Notice of Intended Action provided fair warning that the outcome of that rule-making proceeding could be the rule in question.

**18.9(2)** In determining whether the Notice of Intended Action provided fair warning that the outcome of that rule-making proceeding could be the rule in question the commission shall consider the following factors:

- a. The extent to which persons who will be affected by the rule should have understood that the rule-making proceeding on which it is based could affect their interests;
- b. The extent to which the subject matter of the rule or the issues determined by the rule are different from the subject matter or issues contained in the Notice of Intended Action; and
- c. The extent to which the effects of the rule differ from the effects of the proposed rule contained in the Notice of Intended Action.

**18.9(3)** The commission shall commence a rule-making proceeding within 60 days of its receipt of a petition for rule making seeking the amendment or repeal of a rule that differs from the proposed rule contained in the Notice of Intended Action upon which the rule is based, unless the commission finds that the differences between the adopted rule and the proposed rule are so insubstantial as to make such a rule-making proceeding wholly unnecessary. A copy of any such finding and the petition to which it responds shall be sent to petitioner, the administrative rules coordinator, and the ad-

## TELECOMMUNICATIONS AND TECHNOLOGY COMMISSION, IOWA[751](cont'd)

ministrative rules review committee, within three days of its issuance.

**18.9(4) Concurrent rule-making proceedings.** Nothing in this rule disturbs the discretion of the commission to initiate, concurrently, several different rule-making proceedings on the same subject with several different published Notices of Intended Action.

**751—18.10(17A) Exemptions from public rule-making procedures.**

**18.10(1) Omission of notice and comment.** To the extent the commission for good cause finds that public notice and participation are unnecessary, impracticable, or contrary to the public interest in the process of adopting a particular rule, the commission may adopt that rule without publishing advance Notice of Intended Action in the Iowa Administrative Bulletin and without providing for written or oral public submissions prior to its adoption. The commission shall incorporate the required finding and a brief statement of its supporting reasons in each rule adopted in reliance upon this subrule.

**18.10(2) Categories exempt.** The following narrowly tailored categories of rules are exempt from the usual public notice and participation requirements because those requirements are unnecessary, impracticable, or contrary to the public interest with respect to each and every member of the defined class: no categories exempt.

**18.10(3) Public proceedings on rules adopted without them.** The commission may, at any time, commence a standard rule-making proceeding for the adoption of a rule that is identical or similar to a rule it adopts in reliance upon subrule 18.10(1). Upon written petition by a governmental subdivision, the administrative rules review committee, the administrative rules coordinator, an association having not less than 25 members, or at least 25 persons, the commission shall commence a standard rule-making proceeding for any rule specified in the petition that was adopted in reliance upon subrule 18.10(1). Such a petition must be filed within one year of the publication of the specified rule in the Iowa Administrative Bulletin as an adopted rule. The rule-making proceeding on that rule must be commenced within 60 days of the receipt of such a petition. After a standard rule-making proceeding commenced pursuant to this subrule, the commission may either readopt the rule it adopted without benefit of all usual procedures on the basis of subrule 18.10(1), or may take any other lawful action, including the amendment or repeal of the rule in question, with whatever further proceedings are appropriate.

**751—18.11(17A) Concise statement of reasons.**

**18.11(1) General.** When requested by a person, either prior to the adoption of a rule or within 30 days after its publication in the Iowa Administrative Bulletin as an adopted rule, the commission shall issue a concise statement of reasons for the rule. Requests for such a statement must be in writing and be delivered to the Executive Director of the Commission, ICN, Camp Dodge, W4 Railroad Avenue, P.O. Box 587, Johnston, Iowa 50131-0587. The request should indicate whether the statement is sought for all or only a specified part of the rule. Requests will be considered made on the date received.

**18.11(2) Contents.** The concise statement of reasons shall contain:

- a. The reasons for adopting the rule;
- b. An indication of any change between the text of the proposed rule contained in the published Notice of Intended

Action and the text of the rule as finally adopted, with the reasons for any such change;

c. The principal reasons urged in the rule-making proceeding for and against the rule, and the commission's reasons for overruling the arguments made against the rule.

**18.11(3) Time of issuance.** After a proper request, the commission shall issue a concise statement of reasons by the later of the time the rule is adopted or 35 days after receipt of the request.

**751—18.12(17A) Contents, style, and form of rule.**

**18.12(1) Contents.** Each rule adopted by the commission shall contain the text of the rule and, in addition:

- a. The date the commission adopted the rule;
- b. A brief explanation of the principal reasons for the rule-making action if such reasons are required by 1998 Iowa Acts, chapter 1202, section 8, or if the commission in its discretion decides to include such reasons;
- c. A reference to all rules repealed, amended, or suspended by the rule;
- d. A reference to the specific statutory or other authority authorizing adoption of the rule;
- e. Any findings required by any provision of law as a prerequisite to adoption or effectiveness of the rule;
- f. A brief explanation of the principal reasons for the failure to provide for waivers to the rule if no waiver provision is included and a brief explanation of any waiver or special exceptions provided in the rule if such reasons are required by 1998 Iowa Acts, chapter 1202, section 8, or the commission in its discretion decides to include such reasons; and
- g. The effective date of the rule.

**18.12(2) Incorporation by reference.** The commission may incorporate, by reference in a proposed or adopted rule, and without causing publication of the incorporated matter in full, all or any part of a code, standard, rule, or other matter if the commission finds that the incorporation of its text in the commission proposed or adopted rule would be unduly cumbersome, expensive, or otherwise inexpedient. The reference in the commission proposed or adopted rule shall fully and precisely identify the incorporated matter by location, title, citation, date, and edition, if any; shall briefly indicate the precise subject and the general contents of the incorporated matter; and shall state that the proposed or adopted rule does not include any later amendments or editions of the incorporated matter. The commission may incorporate such matter by reference in a proposed or adopted rule only if the commission makes copies of it readily available to the public. The rule shall state how and where copies of the incorporated matter may be obtained at cost from this commission, and how and where copies may be obtained from an agency of the United States, this state, another state, or the organization, association, or persons, originally issuing that matter. The commission shall retain permanently a copy of any materials incorporated by reference in a rule of the commission.

If the commission adopts standards by reference to another publication, it shall provide a copy of the publication containing the standards to the administrative rules coordinator for deposit in the state law library and may make the standards available electronically.

**18.12(3) References to materials not published in full.** When the administrative code editor decides to omit the full text of a proposed or adopted rule because publication of the full text would be unduly cumbersome, expensive, or otherwise inexpedient, the commission shall prepare and submit to the administrative code editor for inclusion in the Iowa Administrative Bulletin and Iowa Administrative Code a

## TELECOMMUNICATIONS AND TECHNOLOGY COMMISSION, IOWA[751](cont'd)

summary statement describing the specific subject matter of the omitted material. This summary statement shall include the title and a brief description sufficient to inform the public of the specific nature and subject matter of the proposed or adopted rules, and of significant issues involved in these rules. The summary statement shall also describe how a copy of the full text of the proposed or adopted rule, including any unpublished matter and any matter incorporated by reference, may be obtained from the commission. The commission will provide a copy of that full text (at actual cost) upon request and shall make copies of the full text available for review at the state law library and may make the standards available electronically.

At the request of the administrative code editor, the commission shall provide a proposed statement explaining why publication of the full text would be unduly cumbersome, expensive, or otherwise inexpedient.

**18.12(4) Style and form.** In preparing its rules, the commission shall follow the uniform numbering system, form, and style prescribed by the administrative rules coordinator.

**751—18.13(17A) Commission rule-making record.**

**18.13(1) Requirement.** The commission shall maintain an official rule-making record for each rule it proposes by publication in the Iowa Administrative Bulletin of a Notice of Intended Action, or adopts. The rule-making record and materials incorporated by reference must be available for public inspection.

**18.13(2) Contents.** The commission rule-making record shall contain:

a. Copies of all publications in the Iowa Administrative Bulletin with respect to the rule or the proceeding upon which the rule is based and any file-stamped copies of commission submissions to the administrative rules coordinator concerning that rule or the proceeding upon which it is based;

b. Copies of any portions of the commission's public rule-making docket containing entries relating to the rule or the proceeding upon which the rule is based;

c. All written petitions, requests, and submissions received by the commission, and all other written materials of a factual nature as distinguished from opinion that are relevant to the merits of the rule and that were created or compiled by the commission and considered by the Iowa telecommunications and technology commission, in connection with the formulation, proposal, or adoption of the rule or the proceeding upon which the rule is based, except to the extent the commission is authorized by law to keep them confidential; provided, however, that when any such materials are deleted because they are authorized by law to be kept confidential, the commission shall identify in the record the particular materials deleted and state the reasons for that deletion;

d. Any official transcript of oral presentations made in the proceeding upon which the rule is based or, if not transcribed, the stenographic record or electronic recording of those presentations, and any memorandum prepared by a presiding officer summarizing the contents of those presentations;

e. A copy of any regulatory analysis or fiscal impact statement prepared for the proceeding upon which the rule is based;

f. A copy of the rule and any concise statement of reasons prepared for that rule;

g. All petitions for amendments of, or repeal or suspension of, the rule;

h. A copy of any objection to the issuance of that rule without public notice and participation that was filed pur-

suant to Iowa Code section 17A.4(2), by the administrative rules review committee, the governor, or the attorney general;

i. A copy of any objection to the rule filed by the administrative rules review committee, the governor, or the attorney general pursuant to Iowa Code section 17A.4(4), and any commission response to that objection;

j. A copy of any significant written criticism of the rule, including a summary of any petitions for waiver of the rule; and

k. A copy of any executive order concerning the rule.

**18.13(3) Effect of record.** Except as otherwise required by a provision of law, the commission rule-making record required by this rule need not constitute the exclusive basis for commission action on that rule.

**18.13(4) Maintenance of record.** The commission shall maintain the rule-making record indefinitely from the later of the date the rule to which it pertains became effective, the date of the Notice of Intended Action, or the date of any written criticism as described in 18.13(2) "g," "h," "i," or "j."

**751—18.14(17A) Filing of rules.** The commission shall file each rule it adopts in the office of the administrative rules coordinator. The filing must be executed as soon after adoption of the rule as is practicable. At the time of filing, each rule must have attached to it any fiscal impact statement and any concise statement of reasons that was issued with respect to that rule. If a fiscal impact statement or statement of reasons for that rule was not issued until a time subsequent to the filing of that rule, the note or statement must be attached to the filed rule within five working days after the note or statement is issued. In filing a rule, the commission shall use the standard form prescribed by the administrative rules coordinator.

**751—18.15(17A) Effectiveness of rules prior to publication.**

**18.15(1) Grounds.** The commission may make a rule effective after its filing at any stated time prior to 35 days after its indexing and publication in the Iowa Administrative Bulletin if it finds that a statute so provides, the rule confers a benefit or removes a restriction on some segment of the public, or that the effective date of the rule is necessary to avoid imminent peril to the public health, safety, or welfare. The commission shall incorporate the required finding and a brief statement of its supporting reasons in each rule adopted in reliance upon this subrule.

**18.15(2) Special notice.** When the commission makes a rule effective prior to its indexing and publication in reliance upon the provisions of Iowa Code section 17A.5(2) "b" (3), the commission shall employ all reasonable efforts to make its contents known to the persons who may be affected by that rule prior to the rule's indexing and publication. The term "all reasonable efforts" requires the commission to employ the most effective and prompt means of notice rationally calculated to inform potentially affected parties of the effectiveness of the rule that is justified and practical under the circumstances considering the various alternatives available for this purpose, the comparative costs to the commission of utilizing each of those alternatives, and the harm suffered by affected persons from any lack of notice concerning the contents of the rule prior to its indexing and publication. The means that may be used for providing notice of such rules prior to their indexing and publication include, but are not limited to, any one or more of the following means: radio, newspaper, television, signs, mail, telephone, personal notice or electronic means.

## TELECOMMUNICATIONS AND TECHNOLOGY COMMISSION, IOWA[751](cont'd)

A rule made effective prior to its indexing and publication in reliance upon the provisions of Iowa Code section 17A.5(2)"b"(3), shall include in that rule a statement describing the reasonable efforts that will be used to comply with the requirements of subrule 18.15(2).

**751—18.16(17A) General statements of policy.**

**18.16(1)** Compilation, indexing, public inspection. The commission shall maintain an official, current, and dated compilation that is indexed by subject, containing all of its general statements of policy within the scope of Iowa Code section 17A.2(10) "a," "c," "f," "g," "h," "k." Each addition to, change in, or deletion from the official compilation must also be dated, indexed, and a record thereof kept. Except for those portions containing rules governed by Iowa Code section 17A.2(7)"f," or otherwise authorized by law to be kept confidential, the compilation must be made available for public inspection and copying.

**18.16(2)** Enforcement of requirements. A general statement of policy subject to the requirements of this subsection shall not be relied on by the commission to the detriment of any person who does not have actual, timely knowledge of the contents of the statement until the requirements of subrule 18.16(1) are satisfied. This provision is inapplicable to the extent necessary to avoid imminent peril to the public health, safety, or welfare.

**751—18.17(17A) Review by commission of rules.**

**18.17(1)** Any interested person, association, commission, or political subdivision may submit a written request to the administrative rules coordinator requesting the commission to conduct a formal review of a specified rule. Upon approval of that request by the administrative rules coordinator, the commission shall conduct a formal review of a specified rule to determine whether a new rule should be adopted instead or the rule should be amended or repealed. The commission may refuse to conduct a review if it has conducted such a review of the specified rule within five years prior to the filing of the written request.

**18.17(2)** In conducting the formal review, the commission shall prepare within a reasonable time a written report summarizing its findings, its supporting reasons, and any proposed course of action. The report must include a concise statement of the commission's findings regarding the rule's effectiveness in achieving its objectives, including a summary of any available supporting data. The report shall also concisely describe significant written criticisms of the rule received during the previous five years, including a summary of any petitions for waiver of the rule received by the commission or granted by the commission. The report shall describe alternative solutions to resolve the criticisms of the rule, the reasons any were rejected, and any changes made in the rule in response to the criticisms as well as the reasons for the changes. A copy of the commission's report shall be sent to the administrative rules review committee and the administrative rules coordinator. The report must also be available for public inspection.

These rules are intended to implement Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202.

**ARC 8789A****TRANSPORTATION  
DEPARTMENT[761]****Notice of Intended Action**

Notice is also given to the public that the Administrative Rules Review Committee may, on its own motion or on written request by any individual or group, review this proposed action under section 17A.8(6) at a regular or special meeting where the public or interested persons may be heard.

Pursuant to the authority of Iowa Code sections 307.10 and 307.12, the Department of Transportation hereby gives Notice of Intended Action to amend Chapter 118, "Logo Signing," Iowa Administrative Code.

These amendments make the following changes:

- Existing logo signing provides for the following services: gas, food, lodging and camping. These amendments add a fifth service: tourist attractions. However, no more than four mainline signs may be installed in advance of an interchange. A tourist attractions mainline sign may be installed only in lieu of or in combination with another service. Each service sign may contain a maximum of six individual business signs. A combination sign may display no more than three individual business signs for each service.

- There are currently no trailblazing signs provided to direct motorists who have exited the interstate or freeway to navigate to the signed service. Under certain circumstances, these amendments provide that the Department install up to two trailblazing signs on routes under its jurisdiction or make signs available for local jurisdictions to place on routes under their jurisdictions. If more than two signs are needed, the business will not qualify for logo signing. If a local jurisdiction declines to install a trailblazing sign within its jurisdiction, the business will not qualify for logo signing.

- Currently, qualifying services must be located within three miles of the exit. These amendments provide that in urban areas where the number of qualifying applicants for any service exceeds eight, the Department may reduce the maximum travel distance for that service to one mile.

- To qualify for signing, a food establishment must currently operate year-round seven days a week, and serve three meals per day. These amendments require food establishments to operate year-round at least six days a week and allow the Department to make an exception to the three-meal-a-day requirement if vacant space is available and no fully qualifying businesses have applied.

- To qualify for signing, a lodging establishment must have at least ten units, each containing a bathroom and sleeping room. These amendments allow an exception for bed and breakfast establishments.

- These amendments allow supplemental information such as "open 24 hours," "diesel," or "mechanic on duty" to be added to the business sign with prior written approval by the Department.

Any person or agency may submit written comments concerning these proposed amendments or may submit a written request to make an oral presentation. The comments or request shall:

1. Include the name, address, and telephone number of the person or agency authoring the comments or request.
2. Reference the number and title of the proposed rule, as given in this Notice, that is the subject of the comments or request.
3. Indicate the general content of a requested oral presentation.

## TRANSPORTATION DEPARTMENT[761](cont'd)

4. Be addressed to the Department of Transportation, Director's Staff Division, 800 Lincoln Way, Ames, Iowa 50010; fax (515)239-1639; Internet E-mail address: rules@iadot.e-mail.com.

5. Be received by the Director's Staff Division no later than April 13, 1999.

A meeting to hear requested oral presentations is scheduled for Thursday, April 15, 1999, at 10 a.m. in the Commission Conference Room of the Iowa Department of Transportation, 800 Lincoln Way, Ames.

The meeting will be canceled without further notice if no oral presentation is requested.

The proposed amendments may have an impact on small business. The Department has considered the factors listed in Iowa Code subsection 17A.31(4), paragraphs "a" to "l." The following may request the issuance of a regulatory flexibility analysis: the Administrative Rules Review Committee, the Governor, a political subdivision, at least 25 persons signing the request who qualify as a small business, or an organization registered with the Department and representing at least 25 persons. The request must:

1. Include the name, address, and telephone number of the person(s) authoring the request.

2. Be submitted in writing to the Director's Staff Division at the address listed in this Notice.

3. Be delivered to the Director's Staff Division or post-marked no later than 20 days after publication of this Notice in the Iowa Administrative Bulletin.

These amendments are intended to implement Iowa Code section 306C.11.

Proposed rule-making actions:

ITEM 1. Rescind subrule 118.2(2) and adopt in lieu thereof the following **new** subrule:

**118.2(2) Mainline specific service signs.**

a. A maximum of four mainline specific service signs shall be installed in advance of an interchange. One mainline specific service sign shall be provided on the interchange approach for each type of motorist service (gas, food, lodging, camping and tourist attractions) if qualified services are available and minimum spacing requirements can be met. However:

(1) When space is limited or where no more than three qualified motorist services desire signing for each of two types of motorist services, business signs for these services may be displayed on the same mainline specific service sign. A combination sign may display no more than three business signs for each service.

(2) A "TOURIST ATTRACTIONS" mainline specific service sign shall be installed only in lieu of or in combination with another service.

b. Mainline specific service signs shall be erected between the previous interchange and 800 feet in advance of the exit direction sign for the interchange from which the services are available. There shall also be at least 800-foot spacing between the signs. In the direction of traffic, the successive signs shall be those for "TOURIST ATTRACTIONS," "CAMPING," "LODGING," "FOOD," and "GAS," in that order. If the spacing limitations prohibit the erection of specific service signs for all five types of services, preference shall be given to available "GAS," "FOOD," "LODGING," "CAMPING," or "TOURIST ATTRACTIONS" services, in that order.

ITEM 2. Amend paragraph 118.2(3)"b" as follows:

b. If conditions permit, the successive panels along the ramp in the direction of traffic shall be those for "TOURIST

ATTRACTIONS," "CAMPING," "LODGING," "FOOD," and "GAS," in that order. If conditions require sign installation other than successive signs along the ramp, preference shall be given to "GAS," "FOOD," "LODGING," or "CAMPING," or "TOURIST ATTRACTIONS," in that order.

ITEM 3. Amend rule 761—118.2(306C) by adding the following **new** subrule:

**118.2(4) Trailblazing signs.**

a. Trailblazing signs are small signs similar to ramp signs. They are erected on the road network accessed by way of a logo-signed interchange to direct motorists to a particular business installation, if the business is not located along the intersecting roadway.

b. Trailblazing signs are used only on non-fully controlled access highways. They are installed only for business installations which are signed on the mainline.

c. The department shall install trailblazing signs on routes under its jurisdiction and shall make signs available for local jurisdictions to place on routes within their jurisdictions. The department shall install mainline, ramp and trailblazing signs under its jurisdiction only after the local jurisdiction has placed the required trailblazing signs on local routes. If a local jurisdiction declines to install required trailblazing signs within its jurisdiction, the business does not qualify for logo signing.

d. No more than two trailblazing signs shall be erected for a business. If more than two trailblazing signs are required to guide motorists to the business, the business does not qualify for logo signing.

ITEM 4. Amend rule 761—118.3(306C) as follows:

**761—118.3(306C) Placement of business signs on specific service signs.**

**118.3(1) Mainline specific service signs.** A "GAS," "FOOD," "LODGING," or "CAMPING" or "TOURIST ATTRACTIONS" mainline specific service sign shall display a maximum of six individual business signs.

**118.3(2) Ramp specific service signs.** A "GAS," "FOOD," "LODGING," or "CAMPING" or "TOURIST ATTRACTIONS" ramp specific service sign shall display a maximum of six individual business signs.

ITEM 5. Amend subrule 118.4(2) as follows:

**118.4(2) Maximum distance.**

a. The maximum distance that the "GAS," "FOOD," "LODGING," or "CAMPING" or "TOURIST ATTRACTIONS" services may be located from the main traveled way to qualify for a business sign shall not exceed three miles in either direction; however, if within the three-mile limit services of the type being considered are not available, the limit of eligibility may be extended in three-mile increments until services of the type being considered, or 15 miles, is reached. The distance shall be measured from the beginning of the exit ramp.

b. In urban areas where the number of qualifying applicants for any service exceeds eight, the department may reduce the maximum travel distance to one mile for that service.

ITEM 6. Amend paragraph 118.4(4)"b" as follows:

b. Operate year-round seven six days a week, and serve three meals a day (breakfast, lunch, and dinner). In situations where a vacant space is available and no fully qualifying businesses have applied, the department may grant an exception to the three-meal-a-day requirement. A business signed under this procedure shall be bumped by a fully quali-

## TRANSPORTATION DEPARTMENT[761](cont'd)

*fying business applicant after the business has had five years to amortize the cost of its signs. If there are more businesses qualifying for this exception than spaces available, a drawing shall be held as provided in subrule 118.5(4).*

ITEM 7. Amend paragraph 118.4(5)“b” as follows:

b. Provide adequate sleeping accommodations consisting of a minimum of ten units each. Each unit must have a bathroom and a sleeping room. *EXCEPTION: A bed and breakfast establishment is not required to have more than two guest rooms or provide separate bathroom facilities for each room.*

ITEM 8. Amend rule 761—118.4(306C) by renumbering subrule 118.4(7) as 118.4(8) and by adding new subrule 118.4(7) as follows:

118.4(7) Tourist attractions. To qualify for placement of a business sign on a “TOURIST ATTRACTION” specific service sign, the individual site or attraction must:

a. Be an activity or location that is nationally or regionally known and is one or more of the following:

- (1) Natural phenomena.
- (2) Historic site.
- (3) Cultural site.
- (4) Scientific site.
- (5) Educational site.
- (6) Religious site.
- (7) Area of natural beauty.
- (8) Area naturally suited for outdoor recreation.

b. Maintain regular hours for that type of establishment.

c. Be appropriately licensed as required by law.

d. Have restroom facilities available for use by the traveling public.

e. Have drinking water available for the traveling public.

f. Have an on-premise or nearby public telephone available for use by the traveling public.

g. Have adequate parking to accommodate its traffic with a minimum of 10 spaces.

ITEM 9. Amend renumbered subrule 118.4(8) as follows:

118.4(8) Compliance with Iowa Code sections 306C.11 and 306C.13. The individual business installation must be in compliance with Iowa Code sections 306C.11 and 306C.13. If an advertising device which serves a business is erected or maintained in violation of either of these sections, that business shall be disqualified from obtaining *or maintaining* a business sign upon any specific service sign.

ITEM 10. Amend paragraph 118.5(1)“b” as follows:

b. When the advertised activity or on-premise signing of the business installation is not visible from the ramp terminal and a ramp specific service sign has been erected, application shall be made for space on the ramp specific service sign in addition to application for space on the mainline specific service sign. *If the business installation is not located along the intersecting route, application must also be made for trailblazing signs. Application for ramp and trailblazing signs is made through the original logo application.*

ITEM 11. Amend rule 761—118.5(306C) by renumbering subrules 118.5(2) and 118.5(3) as 118.5(3) and 118.5(4) and by adopting new subrule 118.5(2) as follows:

118.5(2) Applications for tourist attraction signing. The department shall submit applications from tourist attractions to the tourist signing committee. The tourist signing committee will determine whether it meets the qualifications of a

tourist attraction. The composition of the committee is set out in 761—subrule 119.5(3).

ITEM 12. Amend subrule 118.6(1) as follows:

118.6(1) Mainline business signs. On mainline business signs, all letters in the principal legend shall be at least 10 inches high, whether capital or lowercase. However, when the symbol or trademark is used alone for the business sign, any legend on it shall be proportional to the size customarily used on the symbol or trademark. The symbol or trademark may also be modified to improve legibility. *Supplemental information such as “open 24 hours,” “diesel,” or “mechanic on duty” may be added to the business sign with prior written approval by the department. This supplemental information shall be displayed using 6-inch letters.*

a. A “GAS” mainline sign shall be contained within a 48-inch-wide and 36-inch-high rectangular panel.

b. A “FOOD,” “LODGING,” or “CAMPING” or “TOURIST ATTRACTIONS” mainline business sign shall be contained within a 60-inch-wide and 36-inch-high rectangular panel.

ITEM 13. Amend paragraph 118.6(2)“b” as follows:

b. A “FOOD,” “LODGING,” or “CAMPING,” or “TOURIST ATTRACTIONS” ramp business sign shall be contained within a 36-inch-wide and 16-inch-high rectangular panel.

ITEM 14. Amend rule 761—118.6(306C) by adding the following new subrule:

118.6(3) Trailblazing business signs. On trailblazing business signs, all letters in the principal legend shall be at least four inches high, whether capital or lower case. However, when the symbol or trademark is used alone for the business sign, any legend on it shall be proportional to size customarily used on the symbol or trademark. The symbol or trademark may also be modified to improve legibility. All trailblazing business signs shall be contained within a 20-inch-wide and 12-inch-high rectangular panel.

**ARC 8794A**

## TRANSPORTATION DEPARTMENT[761]

### Notice of Intended Action

Notice is also given to the public that the Administrative Rules Review Committee may, on its own motion or on written request by any individual or group, review this proposed action under section 17A.8(6) at a regular or special meeting where the public or interested persons may be heard.

Pursuant to the authority of Iowa Code sections 307.10 and 307.12, the Department of Transportation hereby gives Notice of Intended Action to amend Chapter 400, “Vehicle Registration and Certificate of Title,” Iowa Administrative Code.

This amendment will allow a dealer to obtain a duplicate registration receipt from the dealer’s county treasurer when the original registration receipt has been lost and the applicant has traded the formerly owned vehicle to the dealer and purchased a replacement vehicle from the dealer. Currently, if a registration receipt has been lost, a duplicate registration receipt must be obtained from the county treasurer which issued the original registration. A registration receipt is required to process a credit of registration fees.

TRANSPORTATION DEPARTMENT[761](cont'd)

This amendment is proposed as a result of a petition for rule making submitted by the Iowa Automobile Dealers Association. The amendment will hasten the vehicle transfer process for both the purchaser and the dealer.

Any person or agency may submit written comments concerning this proposed amendment or may submit a written request to make an oral presentation. The comments or request shall:

1. Include the name, address, and telephone number of the person or agency authoring the comments or request.
2. Reference the number and title of the proposed rule, as given in this Notice, that is the subject of the comments or request.
3. Indicate the general content of a requested oral presentation.
4. Be addressed to the Department of Transportation, Director's Staff Division, 800 Lincoln Way, Ames, Iowa 50010; fax (515)239-1639; Internet E-mail address: rules@iadot.e-mail.com.
5. Be received by the Director's Staff Division no later than April 13, 1999.

A meeting to hear requested oral presentations is scheduled for Thursday, April 15, 1999, at 10 a.m. in the conference room of the Motor Vehicle Division, which is located on the lower level of Park Fair Mall, 100 Euclid Avenue, Des Moines, Iowa.

The meeting will be canceled without further notice if no oral presentation is requested.

The proposed amendment may have an impact on small business. The Department has considered the factors listed in Iowa Code subsection 17A.31(4), paragraphs "a" to "l." The following may request the issuance of a regulatory flexibility analysis: the Administrative Rules Review Committee, the Governor, a political subdivision, at least 25 persons signing the request who qualify as a small business, or an organization registered with the Department and representing at least 25 persons. The request must:

1. Include the name, address, and telephone number of the person(s) authoring the request.
2. Be submitted in writing to the Director's Staff Division at the address listed in this Notice.
3. Be delivered to the Director's Staff Division or post-marked no later than 20 days after publication of this Notice in the Iowa Administrative Bulletin.

This amendment is intended to implement Iowa Code sections 321.42 and 321.46.

Proposed rule-making action:

Amend paragraph 400.60(1)"c" as follows:

c. The registration receipt for the formerly owned or junked vehicle shall be submitted with the application form. If applicable, the registration receipt shall be completed on the reverse side to show the transfer of ownership. *If the registration receipt has been lost and if the applicant has traded the formerly owned vehicle to a dealer and purchased a replacement vehicle from that dealer, the dealer may obtain a replacement registration receipt from the dealer's county treasurer.* If a titled vehicle has been junked by the vehicle's owner, the junking certificate issued under Iowa Code section 321.52 shall also be submitted.

(1) The date of the reverse side of the registration receipt or on the junking certificate shall determine the date the vehicle was transferred or junked.

(2) If the sold or junked vehicle was a trailer not subject to titling, the owner may obtain a free duplicate registration receipt from the county treasurer for the purpose of claiming credit.

## NOTICE—PUBLIC FUNDS INTEREST RATES

In compliance with Iowa Code chapter 74A and section 12C.6, the committee composed of Treasurer of State Michael L. Fitzgerald, Superintendent of Credit Unions James E. Forney, Superintendent of Banking Michael K. Guttau, and Auditor of State Richard D. Johnson have established today the following rates of interest for public obligations and special assessments. The usury rate for March is 6.75%.

### INTEREST RATES FOR PUBLIC OBLIGATIONS AND ASSESSMENTS

- 74A.2 Unpaid Warrants . . . . . Maximum 6.0%
- 74A.4 Special Assessments . . . . . Maximum 9.0%

RECOMMENDED for 74A.3 and 74A.7: A rate equal to 75% of the Federal Reserve monthly published indices for U.S. Government securities of comparable maturities.

The rate of interest has been determined by a committee of the state of Iowa to be the minimum interest rate that shall be paid on public funds deposited in approved financial institutions. To be eligible to accept deposits of public funds of the state of Iowa, a financial institution shall demonstrate a commitment to serve the needs of the local community in which it is chartered to do business. These needs include credit services as well as deposit services. All such financial institutions are required to provide the committee with a written description of their commitment to provide credit services in the community. This statement is available for examination by citizens.

New official state interest rates, effective March 10, 1999, setting the minimums that may be paid by Iowa depositories on public funds are listed below.

### TIME DEPOSITS

- 7-31 days . . . . . Minimum 4.20%
- 32-89 days . . . . . Minimum 4.30%
- 90-179 days . . . . . Minimum 4.60%
- 180-364 days . . . . . Minimum 4.60%
- One year . . . . . Minimum 4.70%
- Two years or more . . . . . Minimum 5.00%

These are minimum rates only. The one year and less are four-tenths of a percent below average rates. Public body treasurers and their depositories may negotiate a higher rate according to money market rates and conditions.

Inquiries may be sent to Michael L. Fitzgerald, Treasurer of State, State Capitol, Des Moines, Iowa 50319.

**ARC 8835A**

## TREASURER OF STATE[781]

### Notice of Intended Action

Twenty-five interested persons, a governmental subdivision, an agency or association of 25 or more persons may demand an oral presentation hereon as provided in Iowa Code section 17A.4(1)"b."

Notice is also given to the public that the Administrative Rules Review Committee may, on its own motion or on written request by any individual or group, review this proposed action under section 17A.8(6) at a regular or special meeting where the public or interested persons may be heard.

Pursuant to the authority of Iowa Code section 17A.3(1)"b," the Treasurer of State proposes to adopt Chapter 17, "Declaratory Orders," and Chapter 18, "Agency Procedure for Rule Making," Iowa Administrative Code.

TREASURER OF STATE[781](cont'd)

These amendments provide the Treasurer of State's rules governing procedures for declaratory orders and rule making.

The Seventy-seventh General Assembly passed amendments to the Iowa Administrative Procedure Act in 1998 Iowa Acts, chapter 1202. A task force from the Attorney General's Office has drafted amendments to the Uniform Rules on Agency Procedure to implement the amendments to the Iowa Administrative Procedure Act. The task force's amendments are available at the State Law Library, Capitol Building, Des Moines, and are published in IAB Volume XXI, Number 18 (2/24/99), page 1661.

Consideration will be given to all written suggestions or comments on the proposed chapters on or before April 16, 1999. Such written comments should be directed to Bret L. Mills, Deputy Treasurer, Room 114, State Capitol Building, Des Moines, Iowa 50319; fax (515)281-7562. Persons who wish to convey their views by telephone should also contact Bret L. Mills, Deputy Treasurer, at (515)281-8261.

A public hearing will be held on Friday, April 16, 1999, at 9 a.m. in the Office of Treasurer of State located on the first floor of the State Capitol Building, Des Moines, Iowa, at which time comments may be submitted either orally or in writing. At the hearing, persons will be asked to give their names and addresses for the record and to confine their remarks to the subject of the rule.

Any persons who plan to attend the public hearing and have special requirements such as hearing or mobility impairments should contact the Office of Treasurer of State and advise of specific needs.

These amendments are intended to implement Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202. The following amendments are proposed.

ITEM 1. Adopt new 781—Chapter 17 as follows:

CHAPTER 17  
DECLARATORY ORDERS

**781—17.1(17A) Petition for declaratory order.** Any person may file a petition with the department of the treasurer of state for a declaratory order as to the applicability to specified circumstances of a statute, rule, or order within the primary jurisdiction of the department of treasurer of state at Treasurer of State, State Capitol Building, Des Moines, Iowa 50319. A petition is deemed filed when it is received by that office. The department of the treasurer of state shall provide the petitioner with a file-stamped copy of the petition if the petitioner provides the agency an extra copy for this purpose. The petition must be typewritten or legibly handwritten in ink and must substantially conform to the following form:

TREASURER OF STATE

Petition by (Name of Petitioner) for a Declaratory Order on (Cite provisions of law involved).

} PETITION FOR DECLARATORY ORDER

The petition must provide the following information:

1. A clear and concise statement of all relevant facts on which the order is requested.
2. A citation and the relevant language of the specific statutes, rules, policies, decisions, or orders, whose applicability is questioned, and any other relevant law.
3. The questions petitioner wants answered, stated clearly and concisely.

4. The answers to the questions desired by the petitioner and a summary of the reasons urged by the petitioner in support of those answers.

5. The reasons for requesting the declaratory order and disclosure of the petitioner's interest in the outcome.

6. A statement indicating whether the petitioner is currently a party to another proceeding involving the questions at issue and whether, to the petitioner's knowledge, those questions have been decided by, are pending determination by, or are under investigation by, any governmental entity.

7. The names and addresses of other persons, or a description of any class of persons, known by petitioner to be affected by, or interested in, the questions presented in the petition.

8. Any request by petitioner for a meeting provided for by 17.7(17A).

The petition must be dated and signed by the petitioner or the petitioner's representative. It must also include the name, mailing address, and telephone number of the petitioner and petitioner's representative and a statement indicating the person to whom communications concerning the petition should be directed.

**781—17.2(17A) Notice of petition.** Within 15 days after receipt of a petition for a declaratory order, the department of the treasurer of state shall give notice of the petition to all persons not served by the petitioner pursuant to 17.6(17A) to whom notice is required by any provision of law. The department of the treasurer of state may also give notice to any other persons.

**781—17.3(17A) Intervention.**

**17.3(1)** Persons who qualify under any applicable provision of law as an intervenor and who file a petition for intervention within 25 days of the filing of a petition for declaratory order shall be allowed to intervene in a proceeding for a declaratory order.

**17.3(2)** Any person who files a petition for intervention at any time prior to the issuance of an order may be allowed to intervene in a proceeding for a declaratory order at the discretion of the department of the treasurer of state.

**17.3(3)** A petition for intervention shall be filed at the department of the treasurer of state at Treasurer of State, State Capitol Building, Des Moines, Iowa 50319. Such a petition is deemed filed when it is received by that office. The department of the treasurer of state will provide the petitioner with a file-stamped copy of the petition for intervention if the petitioner provides an extra copy for this purpose. A petition for intervention must be typewritten or legibly handwritten in ink and must substantially conform to the following form:

TREASURER OF STATE

Petition by (Name of Original Petitioner) for a Declaratory Order on (Cite provisions of law cited in original petition).

} PETITION FOR INTERVENTION

The petition for intervention must provide the following information:

1. Facts supporting the intervenor's standing and qualifications for intervention.
2. The answers urged by the intervenor to the question or questions presented and a summary of the reasons urged in support of those answers.
3. Reasons for requesting intervention and disclosure of the intervenor's interest in the outcome.

## TREASURER OF STATE[781](cont'd)

4. A statement indicating whether the intervenor is currently a party to any proceeding involving the questions at issue and whether, to the intervenor's knowledge, those questions have been decided by, are pending determination by, or are under investigation by, any governmental entity.

5. The names and addresses of any additional persons, or a description of any additional class of persons, known by the intervenor to be affected by, or interested in, the questions presented.

6. Whether the intervenor consents to be bound by the determination of the matters presented in the declaratory order proceeding.

The petition must be dated and signed by the intervenor or the intervenor's representative. It must also include the name, mailing address, and telephone number of the intervenor and intervenor's representative, and a statement indicating the person to whom communications should be directed.

**781—17.4(17A) Briefs.** The petitioner or any intervenor may file a brief in support of the position urged. The department of the treasurer of state may request a brief from the petitioner, any intervenor, or any other person concerning the questions raised.

**781—17.5(17A) Inquiries.** Inquiries concerning the status of a declaratory order proceeding may be made to the Department of the Treasurer of State, State Capitol Building, Des Moines, Iowa 50319.

**781—17.6(17A) Service and filing of petitions and other papers.**

**17.6(1)** When service required. Except where otherwise provided by law, every petition for declaratory order, petition for intervention, brief, or other paper filed in a proceeding for a declaratory order shall be served upon each of the parties of record to the proceeding, and on all other persons identified in the petition for declaratory order or petition for intervention as affected by or interested in the questions presented, simultaneously with their filing. The party filing a document is responsible for service on all parties and other affected or interested persons.

**17.6(2) Filing—when required.** All petitions for declaratory orders, petitions for intervention, briefs, or other papers in a proceeding for a declaratory order shall be filed with the department of the treasurer of state at Treasurer of State, State Capitol Building, Des Moines, Iowa 50319. All petitions, briefs, or other papers that are required to be served upon a party shall be filed simultaneously with the department of the treasurer of state.

**17.6(3) Service—how made.** Service upon a party represented by an attorney shall be made upon the attorney unless otherwise ordered. Service is made by delivery or by mailing a copy to the person's last-known address. Service by mail is complete upon mailing, except where otherwise specifically provided by statute, rule, or order.

**17.6(4) Filing—when made.** Except where otherwise provided by law, a document is deemed filed at the time it is delivered to the department of the treasurer of state, delivered to an established courier service for immediate delivery to that office, or mailed by first-class mail or state interoffice mail to that office, so long as there is proof of mailing.

**17.6(5) Proof of mailing.** Proof of mailing includes either: a legible United States Postal Service postmark on the envelope, a certificate of service, a notarized affidavit, or a certification in substantially the following form:

I certify under penalty of perjury and pursuant to the laws of Iowa that, on (date of mailing), I mailed copies of (describe document) addressed to the (agency office

and address) and to the names and addresses of the parties listed below by depositing the same in (a United States post office mailbox with correct postage properly affixed or state interoffice mail).

(Date) (Signature)

**781—17.7(17A) Consideration.** Upon request by petitioner, the department of the treasurer of state must schedule a brief and informal meeting between the original petitioner, all intervenors, and the treasurer of state, or a member of the staff of the treasurer of state, to discuss the questions raised. The department of the treasurer of state may solicit comments from any person on the questions raised. Also, comments on the questions raised may be submitted to the department of the treasurer of state by any person.

**781—17.8(17A) Action on petition.**

**17.8(1)** Within the time allowed by 1998 Iowa Acts, chapter 1202, section 13(5), after receipt of a petition for a declaratory order, the treasurer of state or designee shall take action on the petition as required by 1998 Iowa Acts, chapter 1202, section 13(5).

**17.8(2)** The date of issuance of an order or of a refusal to issue an order means the date of mailing of a decision or order or date of delivery if service is by other means unless another date is specified in the order.

**781—17.9(17A) Refusal to issue order.**

**17.9(1)** The department of the treasurer of state shall not issue a declaratory order where prohibited by 1998 Iowa Acts, chapter 1202, section 13(1), and may refuse to issue a declaratory order on some or all questions raised for the following reasons:

1. The petition does not substantially comply with the required form.

2. The petition does not contain facts sufficient to demonstrate that the petitioner will be aggrieved or adversely affected by the failure of the department of the treasurer of state to issue an order.

3. The department of the treasurer of state does not have jurisdiction over the questions presented in the petition.

4. The questions presented by the petition are also presented in a current rule making, contested case, or other agency or judicial proceeding, that may definitively resolve them.

5. The questions presented by the petition would more properly be resolved in a different type of proceeding or by another body with jurisdiction over the matter.

6. The facts or questions presented in the petition are unclear, overbroad, insufficient, or otherwise inappropriate as a basis upon which to issue an order.

7. There is no need to issue an order because the questions raised in the petition have been settled due to a change in circumstances.

8. The petition is not based upon facts calculated to aid in the planning of future conduct but is, instead, based solely upon prior conduct in an effort to establish the effect of that conduct or to challenge an agency decision already made.

9. The petition requests a declaratory order that would necessarily determine the legal rights, duties, or responsibilities of other persons who have not joined in the petition, intervened separately, or filed a similar petition and whose position on the questions presented may fairly be presumed to be adverse to that of petitioner.

10. The petitioner requests the department of the treasurer of state to determine whether a statute is unconstitutional on its face.

## TREASURER OF STATE[781](cont'd)

**17.9(2)** A refusal to issue a declaratory order must indicate the specific grounds for the refusal and constitutes final agency action on the petition.

**17.9(3)** Refusal to issue a declaratory order pursuant to this provision does not preclude the filing of a new petition that seeks to eliminate the grounds for the refusal to issue an order.

**781—17.10(17A) Contents of declaratory order—effective date.** In addition to the order itself, a declaratory order must contain the date of its issuance, the name of petitioner and all intervenors, the specific statutes, rules, policies, decisions, or orders involved, the particular facts upon which it is based, and the reasons for its conclusion.

A declaratory order is effective on the date of issuance.

**781—17.11(17A) Copies of orders.** A copy of all orders issued in response to a petition for a declaratory order shall be mailed promptly to the original petitioner and all intervenors.

**781—17.12(17A) Effect of a declaratory order.** A declaratory order has the same status and binding effect as a final order issued in a contested case proceeding. It is binding on the department of the treasurer of state, the petitioner, and any intervenors (who consent to be bound) and is applicable only in circumstances where the relevant facts and the law involved are indistinguishable from those on which the order was based. As to all other persons, a declaratory order serves only as precedent and is not binding on the department of the treasurer of state. The issuance of a declaratory order constitutes final agency action on the petition.

These rules are intended to implement Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202.

ITEM 2. Adopt new 781—Chapter 18 as follows:

## CHAPTER 18

## AGENCY PROCEDURE FOR RULE MAKING

**781—18.1(17A) Applicability.** Except to the extent otherwise expressly provided by statute, all rules adopted by the agency are subject to the provisions of Iowa Code chapter 17A, the Iowa administrative procedure Act, and the provisions of this chapter.

**781—18.2(17A) Advice on possible rules before notice of proposed rule adoption.** In addition to seeking information by other methods, the agency may, before publication of a Notice of Intended Action under Iowa Code section 17A.4(1)“a,” solicit comments from the public on a subject matter of possible rule making by the agency by causing notice to be published in the Iowa Administrative Bulletin of the subject matter and indicating where, when, and how persons may comment.

**781—18.3(17A) Public rule-making docket.**

**18.3(1)** Docket maintained. The agency shall maintain a current public rule-making docket.

**18.3(2)** Anticipated rule making. The rule-making docket shall list each anticipated rule-making proceeding. A rule-making proceeding is deemed “anticipated” from the time a draft of proposed rules is distributed for internal discussion within the agency. For each anticipated rule-making proceeding the docket shall contain a listing of the precise subject matter which may be submitted for consideration by the department of the treasurer of state for subsequent proposal under the provisions of Iowa Code section 17A.4(1)“a,” the name and address of agency personnel with whom persons may communicate with respect to the matter, and an indication of the present status within the agency of

that possible rule. The agency may also include in the docket other subjects upon which public comment is desired.

**18.3(3)** Pending rule-making proceedings. The rule-making docket shall list each pending rule-making proceeding. A rule-making proceeding is pending from the time it is commenced, by publication in the Iowa Administrative Bulletin of a Notice of Intended Action pursuant to Iowa Code section 17A.4(1)“a,” to the time it is terminated, by publication of a Notice of Termination in the Iowa Administrative Bulletin or the rule becoming effective. For each rule-making proceeding, the docket shall indicate:

- a. The subject matter of the proposed rule;
- b. A citation to all published notices relating to the proceeding;
- c. Where written submissions on the proposed rule may be inspected;
- d. The time during which written submissions may be made;
- e. The names of persons who have made written requests for an opportunity to make oral presentations on the proposed rule, where those requests may be inspected, and where and when oral presentations may be made;
- f. Whether a written request for the issuance of a regulatory analysis, or a concise statement of reasons, has been filed, whether such an analysis or statement or a fiscal impact statement has been issued, and where any such written request, analysis, or statement may be inspected;
- g. The current status of the proposed rule and any agency determinations with respect thereto;
- h. Any known timetable for agency decisions or other action in the proceeding;
- i. The date of the rule’s adoption;
- j. The date of the rule’s filing, indexing, and publication;
- k. The date on which the rule will become effective; and
- l. Where the rule-making record may be inspected.

**781—18.4(17A) Notice of proposed rule making.**

**18.4(1)** Contents. At least 35 days before the adoption of a rule the agency shall cause Notice of Intended Action to be published in the Iowa Administrative Bulletin. The Notice of Intended Action shall include:

- a. A brief explanation of the purpose of the proposed rule;
- b. The specific legal authority for the proposed rule;
- c. Except to the extent impracticable, the text of the proposed rule;
- d. Where, when, and how persons may present their views on the proposed rule; and
- e. Where, when, and how persons may demand an oral proceeding on the proposed rule if the notice does not already provide for one.

Where inclusion of the complete text of a proposed rule in the Notice of Intended Action is impracticable, the agency shall include in the notice a statement fully describing the specific subject matter of the omitted portion of the text of the proposed rule, the specific issues to be addressed by that omitted text of the proposed rule, and the range of possible choices being considered by the agency for the resolution of each of those issues.

**18.4(2)** Incorporation by reference. A proposed rule may incorporate other materials by reference only if it complies with all of the requirements applicable to the incorporation by reference of other materials in an adopted rule that are contained in subrule 18.12(2) of this chapter.

**18.4(3)** Copies of notices. Persons desiring to receive copies of future Notices of Intended Action by subscription

## TREASURER OF STATE[781](cont'd)

must file with the agency a written request indicating the name and address to which such notices should be sent. Within seven days after submission of a Notice of Intended Action to the administrative rules coordinator for publication in the Iowa Administrative Bulletin, the agency shall mail or electronically transmit a copy of that notice to subscribers who have filed a written request for either mailing or electronic transmittal with the agency for Notices of Intended Action. The written request shall be accompanied by payment of the subscription price which may cover the full cost of the subscription service, including its administrative overhead and the cost of copying and mailing the Notices of Intended Action for a period of six months.

**781—18.5(17A) Public participation.**

**18.5(1) Written comments.** For at least 20 days after publication of the Notice of Intended Action, persons may submit argument, data, and views, in writing, on the proposed rule. Such written submissions should identify the proposed rule to which they relate and should be submitted to the Department of the Treasurer of State, State Capitol Building, Des Moines, Iowa 50319, or the person designated in the Notice of Intended Action.

**18.5(2) Oral proceedings.** The agency may, at any time, schedule an oral proceeding on a proposed rule. The agency shall schedule an oral proceeding on a proposed rule if, within 20 days after the published Notice of Intended Action, a written request for an opportunity to make oral presentations is submitted to the agency by the administrative rules review committee, a governmental subdivision, an agency, an association having not less than 25 members, or at least 25 persons. That request must also contain the following additional information:

1. A request by one or more individual persons must be signed by each of them and include the address and telephone number of each of them.

2. A request by an association must be signed by an officer or designee of the association and must contain a statement that the association has at least 25 members and the address and telephone number of the person signing that request.

3. A request by an agency or governmental subdivision must be signed by an official having authority to act on behalf of the entity and must contain the address and telephone number of the person signing that request.

**18.5(3) Conduct of oral proceedings.**

a. **Applicability.** This subrule applies only to those oral rule-making proceedings in which an opportunity to make oral presentations is authorized or required by Iowa Code section 17A.4(1)"b" as amended by 1998 Iowa Acts, chapter 1202, section 8, or this chapter.

b. **Scheduling and notice.** An oral proceeding on a proposed rule may be held in one or more locations and shall not be held earlier than 20 days after notice of its location and time is published in the Iowa Administrative Bulletin. That notice shall also identify the proposed rule by ARC number and citation to the Iowa Administrative Bulletin.

c. **Presiding officer.** The agency, a member of the agency, or another person designated by the agency who will be familiar with the substance of the proposed rule, shall preside at the oral proceeding on a proposed rule. If the agency does not preside, the presiding officer shall prepare a memorandum for consideration by the agency summarizing the contents of the presentations made at the oral proceeding unless the agency determines that such a memorandum is unnecessary because the agency will personally listen to or read the entire transcript of the oral proceeding.

d. **Conduct of proceeding.** At an oral proceeding on a proposed rule, persons may make oral statements and make documentary and physical submissions, which may include data, views, comments or arguments concerning the proposed rule. Persons wishing to make oral presentations at such a proceeding are encouraged to notify the agency at least one business day prior to the proceeding and indicate the general subject of their presentations. At the proceeding, those who participate shall indicate their names and addresses, identify any persons or organizations they may represent, and provide any other information relating to their participation deemed appropriate by the presiding officer. Oral proceedings shall be open to the public and shall be recorded by stenographic or electronic means.

(1) At the beginning of the oral proceeding, the presiding officer shall give a brief synopsis of the proposed rule, a statement of the statutory authority for the proposed rule, and the reasons for the agency decision to propose the rule. The presiding officer may place time limitations on individual oral presentations when necessary to ensure the orderly and expeditious conduct of the oral proceeding. To encourage joint oral presentations and to avoid repetition, additional time may be provided for persons whose presentations represent the views of other individuals as well as their own views.

(2) Persons making oral presentations are encouraged to avoid restating matters which have already been submitted in writing.

(3) To facilitate the exchange of information, the presiding officer may, where time permits, open the floor to questions or general discussion.

(4) The presiding officer shall have the authority to take any reasonable action necessary for the orderly conduct of the meeting.

(5) Physical and documentary submissions presented by participants in the oral proceeding shall be submitted to the presiding officer. Such submissions become the property of the agency.

(6) The oral proceeding may be continued by the presiding officer to a later time without notice other than by announcement at the hearing.

(7) Participants in an oral proceeding shall not be required to take an oath or to submit to cross-examination. However, the presiding officer in an oral proceeding may question participants and permit the questioning of participants by other participants about any matter relating to that rule-making proceeding, including any prior written submissions made by those participants in that proceeding; but no participant shall be required to answer any question.

(8) The presiding officer in an oral proceeding may permit rebuttal statements and request the filing of written statements subsequent to the adjournment of the oral presentations.

**18.5(4) Additional information.** In addition to receiving written comments and oral presentations on a proposed rule according to the provisions of this rule, the agency may obtain information concerning a proposed rule through any other lawful means deemed appropriate under the circumstances.

**18.5(5) Accessibility.** The agency shall schedule oral proceedings in rooms accessible to and functional for persons with physical disabilities. Persons who have special requirements should contact the treasurer of state at (515) 281-5368 in advance to arrange access or other needed services.

**781—18.6(17A) Regulatory analysis.**

## TREASURER OF STATE[781](cont'd)

**18.6(1)** Definition of small business. A "small business" is defined in 1998 Iowa Acts, chapter 1202, section 10(7).

**18.6(2)** Mailing list. Small businesses or organizations of small businesses may be registered on the agency's small business impact list by making a written application addressed to Treasurer of State, State Capitol Building, Des Moines, Iowa 50319. The application for registration shall state:

- a. The name of the small business or organization of small businesses;
- b. Its address;
- c. The name of a person authorized to transact business for the applicant;
- d. A description of the applicant's business or organization. An organization representing 25 or more persons who qualify as a small business shall indicate that fact.
- e. Whether the registrant desires copies of Notices of Intended Action at cost, or desires advance notice of the subject of all or some specific category of proposed rule making affecting small business.

The agency may at any time request additional information from the applicant to determine whether the applicant is qualified as a small business or as an organization of 25 or more small businesses. The agency may periodically send a letter to each registered small business or organization of small businesses asking whether that business or organization wishes to remain on the registration list. The name of a small business or organization of small businesses will be removed from the list if a negative response is received, or if no response is received within 30 days after the letter is sent.

**18.6(3)** Time of mailing. Within seven days after submission of a Notice of Intended Action to the administrative rules coordinator for publication in the Iowa Administrative Bulletin, the agency shall mail to all registered small businesses or organizations of small businesses, in accordance with their request, either a copy of the Notice of Intended Action or notice of the subject of that proposed rule making. In the case of a rule that may have an impact on small business adopted in reliance upon Iowa Code section 17A.4(2), the agency shall mail notice of the adopted rule to registered businesses or organizations prior to the time the adopted rule is published in the Iowa Administrative Bulletin.

**18.6(4)** Qualified requesters for regulatory analysis—economic impact. The agency shall issue a regulatory analysis of a proposed rule that conforms to the requirements of 1998 Iowa Acts, chapter 1202, section 10(2a), after a proper request from:

- a. The administrative rules coordinator;
- b. The administrative rules review committee.

**18.6(5)** Qualified requesters for regulatory analysis—business impact. The agency shall issue a regulatory analysis of a proposed rule that conforms to the requirements of 1998 Iowa Acts, chapter 1202, section 10(2b), after a proper request from:

- a. The administrative rules review committee;
- b. The administrative rules coordinator;
- c. At least 25 or more persons who sign the request provided that each represents a different small business;
- d. An organization representing at least 25 small businesses. That organization shall list the name, address and telephone number of not less than 25 small businesses it represents.

**18.6(6)** Time period for analysis. Upon receipt of a timely request for a regulatory analysis the agency shall adhere to the time lines described in 1998 Iowa Acts, chapter 1202, section 10(4).

**18.6(7)** Contents of request. A request for a regulatory analysis is made when it is mailed or delivered to the agency. The request shall be in writing and satisfy the requirements of 1998 Iowa Acts, chapter 1202, section 10(1).

**18.6(8)** Contents of concise summary. The contents of the concise summary shall conform to the requirements of 1998 Iowa Acts, chapter 1202, section 10(4,5).

**18.6(9)** Publication of a concise summary. The agency shall make available, to the maximum extent feasible, copies of the published summary in conformance with 1998 Iowa Acts, chapter 1202, section 10(5).

**18.6(10)** Regulatory analysis contents—rules review committee or rules coordinator. When a regulatory analysis is issued in response to a written request from the administrative rules review committee, or the administrative rules coordinator, the regulatory analysis shall conform to the requirements of 1998 Iowa Acts, chapter 1202, section 10(2a), unless a written request expressly waives one or more of the items listed in the section.

**18.6(11)** Regulatory analysis contents—substantial impact on small business. When a regulatory analysis is issued in response to a written request from the administrative rules review committee, the administrative rules coordinator, at least 25 persons signing that request who each qualify as a small business or by an organization representing at least 25 small businesses, the regulatory analysis shall conform to the requirements of 1998 Iowa Acts, chapter 1202, section 10(2b).

**781—18.7(17A,25B) Fiscal impact statement.**

**18.7(1)** A proposed rule that mandates additional combined expenditures exceeding \$100,000 by all affected political subdivisions or agencies and entities which contract with political subdivisions to provide services must be accompanied by a fiscal impact statement outlining the costs associated with the rule. A fiscal impact statement must satisfy the requirements of Iowa Code section 25B.6.

**18.7(2)** If the agency determines at the time it adopts a rule that the fiscal impact statement upon which the rule is based contains errors, the agency shall, at the same time, issue a corrected fiscal impact statement and publish the corrected fiscal impact statement in the Iowa Administrative Bulletin.

**781—18.8(17A) Time and manner of rule adoption.**

**18.8(1)** Time of adoption. The agency shall not adopt a rule until the period for making written submissions and oral presentations has expired. Within 180 days after the later of the publication of the Notice of Intended Action, or the end of oral proceedings thereon, the agency shall adopt a rule pursuant to the rule-making proceeding or terminate the proceeding by publication of a notice to that effect in the Iowa Administrative Bulletin.

**18.8(2)** Consideration of public comment. Before the adoption of a rule, the agency shall consider fully all of the written submissions and oral submissions received in that rule-making proceeding or any memorandum summarizing such oral submissions, and any regulatory analysis or fiscal impact statement issued in that rule-making proceeding.

**18.8(3)** Reliance on agency expertise. Except as otherwise provided by law, the agency may use its own experience, technical competence, specialized knowledge, and judgment in the adoption of a rule.

**781—18.9(17A) Variance between adopted rule and published notice of proposed rule adoption.**

## TREASURER OF STATE[781](cont'd)

**18.9(1)** The agency shall not adopt a rule that differs from the rule proposed in the Notice of Intended Action on which the rule is based unless:

- a. The differences are within the scope of the subject matter announced in the Notice of Intended Action and are in character with the issues raised in that notice; and
- b. The differences are a logical outgrowth of the contents of that Notice of Intended Action and the comments submitted in response thereto; and
- c. The Notice of Intended Action provided fair warning that the outcome of that rule-making proceeding could be the rule in question.

**18.9(2)** In determining whether the Notice of Intended Action provided fair warning that the outcome of that rule-making proceeding could be the rule in question, the agency shall consider the following factors:

- a. The extent to which persons who will be affected by the rule should have understood that the rule-making proceeding on which it is based could affect their interests;
- b. The extent to which the subject matter of the rule or the issues determined by the rule are different from the subject matter or issues contained in the Notice of Intended Action; and
- c. The extent to which the effects of the rule differ from the effects of the proposed rule contained in the Notice of Intended Action.

**18.9(3)** The agency shall commence a rule-making proceeding within 60 days of its receipt of a petition for rule making seeking the amendment or repeal of a rule that differs from the proposed rule contained in the Notice of Intended Action upon which the rule is based, unless the agency finds that the differences between the adopted rule and the proposed rule are so insubstantial as to make such a rule-making proceeding wholly unnecessary. A copy of any such finding and the petition to which it responds shall be sent to petitioner, the administrative rules coordinator, and the administrative rules review committee, within three days of its issuance.

**18.9(4)** Concurrent rule-making proceedings. Nothing in this rule disturbs the discretion of the agency to initiate, concurrently, several different rule-making proceedings on the same subject with several different published Notices of Intended Action.

#### **781—18.10(17A) Exemptions from public rule-making procedures.**

**18.10(1)** Omission of notice and comment. To the extent the agency for good cause finds that public notice and participation are unnecessary, impracticable, or contrary to the public interest in the process of adopting a particular rule, the agency may adopt that rule without publishing advance Notice of Intended Action in the Iowa Administrative Bulletin and without providing for written or oral public submissions prior to its adoption. The agency shall incorporate the required finding and a brief statement of its supporting reasons in each rule adopted in reliance upon this subrule.

**18.10(2)** Categories exempt. The following narrowly tailored categories of rules are exempted from the usual public notice and participation requirements because those requirements are unnecessary, impracticable, or contrary to the public interest with respect to each and every member of the defined class.

**18.10(3)** Public proceedings on rules adopted without them. The agency may, at any time, commence a standard rule-making proceeding for the adoption of a rule that is identical or similar to a rule it adopts in reliance upon subrule 18.10(1). Upon written petition by a governmental subdivi-

sion, the administrative rules review committee, an agency, the administrative rules coordinator, an association having not less than 25 members, or at least 25 persons, the agency shall commence a standard rule-making proceeding for any rule specified in the petition that was adopted in reliance upon subrule 18.10(1). Such a petition must be filed within one year of the publication of the specified rule in the Iowa Administrative Bulletin as an adopted rule. The rule-making proceeding on that rule must be commenced within 60 days of the receipt of such a petition. After a standard rule-making proceeding commenced pursuant to this subrule, the agency may either readopt the rule it adopted without benefit of all usual procedures on the basis of subrule 18.10(1), or may take any other lawful action, including the amendment or repeal of the rule in question, with whatever further proceedings are appropriate.

#### **781—18.11(17A) Concise statement of reasons.**

**18.11(1)** General. When requested by a person, either prior to the adoption of a rule or within 30 days after its publication in the Iowa Administrative Bulletin as an adopted rule, the agency shall issue a concise statement of reasons for the rule. Requests for such a statement must be in writing and be delivered to Treasurer of State, State Capitol Building, Des Moines, Iowa 50319. The request should indicate whether the statement is sought for all or only a specified part of the rule. Requests will be considered made on the date received.

**18.11(2)** Contents. The concise statement of reasons shall contain:

- a. The reasons for adopting the rule;
- b. An indication of any change between the text of the proposed rule contained in the published Notice of Intended Action and the text of the rule as finally adopted, with the reasons for any such change;
- c. The principal reasons urged in the rule-making proceeding for and against the rule, and the agency's reasons for overruling the arguments made against the rule.

**18.11(3)** Time of issuance. After a proper request, the agency shall issue a concise statement of reasons by the later of the time the rule is adopted or 35 days after receipt of the request.

#### **781—18.12(17A) Contents, style, and form of rule.**

**18.12(1)** Contents. Each rule adopted by the agency shall contain the text of the rule and, in addition:

- a. The date the agency adopted the rule;
- b. A brief explanation of the principal reasons for the rule-making action if such reasons are required by 1998 Iowa Acts, chapter 1202, section 8, or the agency in its discretion decides to include such reasons;
- c. A reference to all rules repealed, amended, or suspended by the rule;
- d. A reference to the specific statutory or other authority authorizing adoption of the rule;
- e. Any findings required by any provision of law as a prerequisite to adoption or effectiveness of the rule;
- f. A brief explanation of the principal reasons for the failure to provide for waivers to the rule if no waiver provision is included and a brief explanation of any waiver or special exceptions provided in the rule if such reasons are required by 1998 Iowa Acts, chapter 1202, section 8, or the agency in its discretion decides to include such reasons; and
- g. The effective date of the rule.

**18.12(2)** Incorporation by reference. The agency may incorporate by reference in a proposed or adopted rule, and without causing publication of the incorporated matter in

## TREASURER OF STATE[781](cont'd)

full, all or any part of a code, standard, rule, or other matter if the agency finds that the incorporation of its text in the agency proposed or adopted rule would be unduly cumbersome, expensive, or otherwise inexpedient. The reference in the agency proposed or adopted rule shall fully and precisely identify the incorporated matter by location, title, citation, date, and edition, if any; shall briefly indicate the precise subject and the general contents of the incorporated matter; and shall state that the proposed or adopted rule does not include any later amendments or editions of the incorporated matter. The agency may incorporate such matter by reference in a proposed or adopted rule only if the agency makes copies of it readily available to the public. The rule shall state how and where copies of the incorporated matter may be obtained at cost from this agency, and how and where copies may be obtained from the agency of the United States, this state, another state, or the organization, association, or persons, originally issuing that matter. The agency shall retain permanently a copy of any materials incorporated by reference in a rule of the agency.

If the agency adopts standards by reference to another publication, it shall provide a copy of the publication containing the standards to the administrative rules coordinator for deposit in the state law library and may make the standards available electronically.

**18.12(3)** References to materials not published in full. When the administrative code editor decides to omit the full text of a proposed or adopted rule because publication of the full text would be unduly cumbersome, expensive, or otherwise inexpedient, the agency shall prepare and submit to the administrative code editor for inclusion in the Iowa Administrative Bulletin and Iowa Administrative Code a summary statement describing the specific subject matter of the omitted material. This summary statement shall include the title and a brief description sufficient to inform the public of the specific nature and subject matter of the proposed or adopted rules, and of significant issues involved in these rules. The summary statement shall also describe how a copy of the full text of the proposed or adopted rule, including any unpublished matter and any matter incorporated by reference, may be obtained from the agency. The agency will provide a copy of that full text (at actual cost) upon request and shall make copies of the full text available for review at the state law library and may make the standards available electronically.

At the request of the administrative code editor, the agency shall provide a proposed statement explaining why publication of the full text would be unduly cumbersome, expensive, or otherwise inexpedient.

**18.12(4)** Style and form. In preparing its rules, the agency shall follow the uniform numbering system, form, and style prescribed by the administrative rules coordinator.

**781—18.13(17A) Agency rule-making record.**

**18.13(1)** Requirement. The agency shall maintain an official rule-making record for each rule it proposes by publication in the Iowa Administrative Bulletin of a Notice of Intended Action, or adopts. The rule-making record and materials incorporated by reference must be available for public inspection.

**18.13(2)** Contents. The agency rule-making record shall contain:

a. Copies of all publications in the Iowa Administrative Bulletin with respect to the rule or the proceeding upon which the rule is based and any file-stamped copies of agency submissions to the administrative rules coordinator

concerning that rule or the proceeding upon which it is based;

b. Copies of any portions of the agency's public rule-making docket containing entries relating to the rule or the proceeding upon which the rule is based;

c. All written petitions, requests, and submissions received by the agency, and all other written materials of a factual nature as distinguished from opinion that are relevant to the merits of the rule and that were created or compiled by the agency and considered by the treasurer of state, in connection with the formulation, proposal, or adoption of the rule or the proceeding upon which the rule is based, except to the extent the agency is authorized by law to keep them confidential; provided, however, that when any such materials are deleted because they are authorized by law to be kept confidential, the agency shall identify in the record the particular materials deleted and state the reasons for that deletion;

d. Any official transcript of oral presentations made in the proceeding upon which the rule is based or, if not transcribed, the stenographic record or electronic recording of those presentations, and any memorandum prepared by a presiding officer summarizing the contents of those presentations;

e. A copy of any regulatory analysis or fiscal impact statement prepared for the proceeding upon which the rule is based;

f. A copy of the rule and any concise statement of reasons prepared for that rule;

g. All petitions for amendment or repeal or suspension of the rule;

h. A copy of any objection to the issuance of that rule without public notice and participation that was filed pursuant to Iowa Code section 17A.4(2) by the administrative rules review committee, the governor, or the attorney general;

i. A copy of any objection to the rule filed by the administrative rules review committee, the governor, or the attorney general pursuant to Iowa Code section 17A.4(4), and any agency response to that objection;

\*j. A copy of any significant written criticism of the rule, including a summary of any petitions for waiver of the rule; and

k. A copy of any executive order concerning the rule.

**18.13(3)** Effect of record. Except as otherwise required by a provision of law, the agency rule-making record required by this rule need not constitute the exclusive basis for agency action on that rule.

**\*18.13(4)** Maintenance of record. The agency shall maintain the rule-making record for a period of not less than five years from the later of the date the rule to which it pertains became effective, the date of the Notice of Intended Action, or the date of any written criticism as described in 18.13(2) "g," "h," "i," or "j."

(Alternatively, the agency can maintain the file indefinitely.)

(\*NOTE: Alternatively to 18.13(2)"j" and the amendment to 18.13(4), an agency could keep a separate file of significant written criticisms to rules and maintain those for five years.)

**781—18.14(17A) Filing of rules.** The agency shall file each rule it adopts in the office of the administrative rules coordinator. The filing must be executed as soon after adoption of the rule as is practicable. At the time of filing, each rule must have attached to it any fiscal impact statement and any concise statement of reasons that was issued with respect to that

## TREASURER OF STATE[781](cont'd)

rule. If a fiscal impact statement or statement of reasons for that rule was not issued until a time subsequent to the filing of that rule, the note or statement must be attached to the filed rule within five working days after the note or statement is issued. In filing a rule, the agency shall use the standard form prescribed by the administrative rules coordinator.

**781—18.15(17A) Effectiveness of rules prior to publication.**

**18.15(1) Grounds.** The agency may make a rule effective after its filing at any stated time prior to 35 days after its indexing and publication in the Iowa Administrative Bulletin if it finds that a statute so provides, the rule confers a benefit or removes a restriction on some segment of the public, or that the effective date of the rule is necessary to avoid imminent peril to the public health, safety, or welfare. The agency shall incorporate the required finding and a brief statement of its supporting reasons in each rule adopted in reliance upon this subrule.

**18.15(2) Special notice.** When the agency makes a rule effective prior to its indexing and publication in reliance upon the provisions of Iowa Code section 17A.5(2)"b"(3), the agency shall employ all reasonable efforts to make its contents known to the persons who may be affected by that rule prior to the rule's indexing and publication. The term "all reasonable efforts" requires the agency to employ the most effective and prompt means of notice rationally calculated to inform potentially affected parties of the effectiveness of the rule that is justified and practical under the circumstances considering the various alternatives available for this purpose, the comparative costs to the agency of utilizing each of those alternatives, and the harm suffered by affected persons from any lack of notice concerning the contents of the rule prior to its indexing and publication. The means that may be used for providing notice of such rules prior to their indexing and publication include, but are not limited to, any one or more of the following means: radio, newspaper, television, signs, mail, telephone, personal notice or electronic means.

A rule made effective prior to its indexing and publication in reliance upon the provisions of Iowa Code section 17A.5(2)"b"(3) shall include in that rule a statement describing the reasonable efforts that will be used to comply with the requirements of subrule 18.15(2).

**781—18.16(17A) General statements of policy.**

**18.16(1) Compilation, indexing, public inspection.** The agency shall maintain an official, current, and dated compilation that is indexed by subject, containing all of its general statements of policy within the scope of Iowa Code section 17A.2(10)"a," "c," "f," "g," "h," "k." Each addition to, change in, or deletion from the official compilation must also be dated, indexed, and a record thereof kept. Except for those portions containing rules governed by Iowa Code section 17A.2(7)"f," or otherwise authorized by law to be kept confidential, the compilation must be made available for public inspection and copying.

**18.16(2) Enforcement of requirements.** A general statement of policy subject to the requirements of this subsection shall not be relied on by the agency to the detriment of any person who does not have actual, timely knowledge of the contents of the statement until the requirements of subrule 18.16(1) are satisfied. This provision is inapplicable to the extent necessary to avoid imminent peril to the public health, safety, or welfare.

**781—18.17(17A) Review by agency of rules.**

**18.17(1)** Any interested person, association, agency, or political subdivision may submit a written request to the administrative rules coordinator requesting the agency to conduct a formal review of a specified rule. Upon approval of that request by the administrative rules coordinator, the agency shall conduct a formal review of a specified rule to determine whether a new rule should be adopted instead or the rule should be amended or repealed. The agency may refuse to conduct a review if it has conducted such a review of the specified rule within five years prior to the filing of the written request.

**18.17(2)** In conducting the formal review, the agency shall prepare within a reasonable time a written report summarizing its findings, its supporting reasons, and any proposed course of action. The report must include a concise statement of the agency's findings regarding the rule's effectiveness in achieving its objectives, including a summary of any available supporting data. The report shall also concisely describe significant written criticisms of the rule received during the previous five years, including a summary of any petitions for waiver of the rule received by the agency or granted by the agency. The report shall describe alternative solutions to resolve the criticisms of the rule, the reasons any were rejected, and any changes made in the rule in response to the criticisms as well as the reasons for the changes. A copy of the agency's report shall be sent to the administrative rules review committee and the administrative rules coordinator. The report must also be available for public inspection.

These rules are intended to implement Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202.

ARC 8820A

**VETERINARY MEDICINE  
BOARD[811]****Notice of Intended Action**

Twenty-five interested persons, a governmental subdivision, an agency or association of 25 or more persons may demand an oral presentation hereon as provided in Iowa Code section 17A.4(1)"b."

Notice is also given to the public that the Administrative Rules Review Committee may, on its own motion or on written request by any individual or group, review this proposed action under section 17A.8(6) at a regular or special meeting where the public or interested persons may be heard.

Pursuant to the authority of Iowa Code sections 17A.3 and 169.5, the Board of Veterinary Medicine gives Notice of Intended Action to rescind Chapter 3, "Declaratory Rulings," and adopt a new Chapter 3, "Declaratory Orders," and to rescind Chapter 4, "Agency Procedure for Rule Making," and Chapter 10, "Discipline," Iowa Administrative Code, and adopt new Chapters 4 and 10 with the same titles.

These proposed amendments are intended to implement 1998 Iowa Acts, chapter 1202, relating to revisions to the Iowa Administrative Procedure Act. The proposed amendments rescind the existing chapters on agency rule making, declaratory rules, and the handling of contested cases. The proposed amendments adopt by reference the uniform rules drafted by the Attorney General's office in the areas of rule making and declaratory orders. The proposed amendments adopt new language relating to licensee discipline and contested cases. The new language is similar to the uniform rules in many respects, but there are substantial changes from those rules to reflect the nature of the Board.

## VETERINARY MEDICINE BOARD[811](cont'd)

Any interested person may make written suggestions or comments on the proposed rules prior to 4:30 p.m. on April 13, 1999. Such written material should be directed to Dr. John J. Schiltz, Acting State Veterinarian, Board of Veterinary Medicine, Iowa Department of Agriculture and Land Stewardship, Wallace State Office Building, Des Moines, Iowa 50319. Comments may also be faxed to (515) 281-4282 or E-mailed to: John.Schiltz@idals.state.ia.us. A public hearing has been scheduled to receive public comments on Friday, April 16, 1999, at 2:30 p.m. in the First Floor Conference Room, Wallace State Office Building, East Ninth and Grand, Des Moines, Iowa.

These proposed rules are intended to implement Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202, and Iowa Code chapters 169 and 272C.

ITEM 1. Rescind 811—Chapters 3 and 4 and adopt the following new chapters:

### CHAPTER 3 DECLARATORY ORDERS

The veterinary medicine board hereby adopts the declaratory orders segment of the Uniform Rules on Agency Procedure which are printed in the first volume of the Iowa Administrative Code with the following amendments:

**811—3.1(17A,169,272C) Petition for declaratory order.** In lieu of the words “(designate agency)” the first time the words are used, insert “Iowa board of veterinary medicine (hereinafter referred to as “the board”)”. In lieu of the words “(designate agency)” the subsequent times the words are used, insert “board”. In lieu of the words “(designate office)”, insert “State Veterinarian’s Office, Wallace State Office Building, East Ninth and Grand, Des Moines, Iowa 50319.” In lieu of the words “(AGENCY NAME)”, insert “IOWA BOARD OF VETERINARY MEDICINE”.

**811—3.2(17A,169,272C) Notice of petition.** In lieu of the words and numbers “\_\_\_ days (15 or less)”, insert “15 days”. In lieu of the words “(designate agency)”, insert “board”.

**811—3.3(17A,169,272C) Intervention.**

**3.3(1)** In lieu of the words “\_\_\_ days”, insert “20 days”.

**3.3(2)** In lieu of the words “(designate agency)”, insert “the board”.

**3.3(3)** In lieu of the words “(designate office)”, insert “the state veterinarian’s office at the Iowa department of agriculture and land stewardship in the Wallace State Office Building”. In lieu of the words “(designate agency)”, insert “board”. In lieu of the words “(AGENCY NAME)”, insert “IOWA BOARD OF VETERINARY MEDICINE”. Delete paragraph 6 and insert in lieu thereof the following:

“6. A statement that the intervenor consents to be bound by the determination of the matters presented in the declaratory order proceeding.”

**811—3.4(17A,169,272C) Briefs.** In lieu of the words “(designate agency)”, insert “board”.

**811—3.5(17A,169,272C) Inquiries.** In lieu of the words “(designate official by full title and address)”, insert “the State Veterinarian, Iowa Department of Agriculture and Land Stewardship, Wallace State Office Building, East Ninth and Grand, Des Moines, Iowa 50319”.

**811—3.6(17A,169,272C) Service and filing of petitions and other papers.**

**3.6(2)** In lieu of the words “(specify office and address)”, insert “the State Veterinarian, Iowa Department of Agriculture and Land Stewardship, Wallace State Office Building, East Ninth and Grand, Des Moines, Iowa 50319”. In lieu of the words “(agency name)”, insert “board”.

**3.6(3)** In lieu of the words “(uniform rule on contested cases X.12(17A))”, insert “rule 10.23(17A,169,272C)”.

**811—3.7(17A,169,272C) Consideration.** In lieu of the words “(designate agency)”, insert “board”.

**811—3.8(17A,169,272C) Action on petition.**

**3.8(1)** In lieu of the words “(designate agency head)”, insert “the chairperson of the board”.

**3.8(2)** In lieu of the words “(contested case uniform rule X.2(17A))”, insert “rule 10.14(17A,169,272C)”.

**811—3.9(17A,169,272C) Refusal to issue order.**

**3.9(1)** In lieu of the words “(designate agency)”, insert “board”.

**811—3.12(17A,169,272C) Effect of a declaratory order.** In lieu of the words “(designate agency)”, insert “board”. Delete the words “(who consent to be bound)”.

### CHAPTER 4 AGENCY PROCEDURE FOR RULE MAKING

The veterinary medicine board hereby adopts the agency procedure for rule making segment of the uniform rules on agency procedure which are printed in the first volume of the Iowa Administrative Code with the following amendments:

**811—4.1(17A,169,272C) Applicability.** In lieu of the word “agency”, insert “the Iowa board of veterinary medicine (hereinafter referred to as “the board”)”.

**811—4.3(17A,169,272C) Public rule-making docket.**

**4.3(2)** In lieu of the words “(commission, board, council, director)”, insert “board”.

**811—4.4(17A,169,272C) Notice of proposed rule making.**

**4.4(3)** In lieu of the words “(specify time period)”, insert “one year”.

**811—4.5(17A,169,272C) Public participation.**

**4.5(1)** In lieu of the words “(identify office and address)”, insert “the State Veterinarian, Iowa Department of Agriculture and Land Stewardship, Wallace State Office Building, East Ninth and Grand, Des Moines, Iowa 50319”.

**4.5(5)** In lieu of the words “(designate office and telephone number)”, insert “the state veterinarian office at (515)281-5305”.

**811—4.6(17A,169,272C) Regulatory analysis.**

**4.6(2)** In lieu of the words “(designate office)”, insert “state veterinarian’s office”.

**811—4.10(17A,169,272C) Exemptions from public rule-making procedures.**

**4.10(2)** is not adopted.

**811—4.11(17A,169,272C) Concise statement of reasons.**

**4.11(1)** In lieu of the words “(specify the office and address)”, insert “the State Veterinarian, Iowa Department of Agriculture and Land Stewardship, Wallace State Office Building, E. 9th and Grand, Des Moines, Iowa 50319”.

**811—4.13(17A,169,272C) Agency rule-making record.**

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**4.13(2)** In lieu of the words “(agency head)”, insert “chairperson of the board”.

ITEM 2. Rescind 811—Chapter 10 and adopt the following new chapter in lieu thereof:

CHAPTER 10  
DISCIPLINE

**811—10.1(17A,169,272C) Board authority.** The Iowa board of veterinary medicine (hereinafter referred to as “the board”) may discipline a veterinarian, for any grounds stated in Iowa Code chapters 169 and 272C or rules promulgated thereunder.

**811—10.2(17A,169,272C) Complaints and investigations.** Complaints are allegations of wrongful acts or omissions relating to the ethical or professional conduct of a licensee.

**10.2(1)** In accordance with Iowa Code section 272C.3(1)“c,” the board shall investigate or review, upon written complaint or upon its own motion pursuant to other information received by the board, alleged acts or omissions which the board reasonably believes constitute cause for licensee discipline.

**10.2(2)** The executive secretary or authorized designee shall investigate complaints in order to determine the probability that a violation of law or rule has occurred.

**811—10.3(17A,169,272C) Investigatory subpoena powers.** The board shall have the authority to issue an investigatory subpoena in accordance with the provisions of Iowa Code section 17A.13.

**10.3(1)** A subpoena which requires production of real evidence that is necessary to an investigation may be issued upon the authority of the executive secretary or a designee.

**10.3(2)** In the event obedience to a subpoena is refused, the requesting party may petition the district court for enforcement.

**811—10.4(17A,169,272C) Board action.** The board shall review investigative conclusions and take one of the following actions:

1. Close the investigative case without action.
2. Request further inquiry.
3. Appoint a peer review committee to assist with the investigation.
4. Determine the existence of sufficient probable cause and order a disciplinary hearing to be held in compliance with Iowa Code section 272C.6.

**811—10.5(17A,169,272C) Peer review committee.** The board may establish a peer review committee to assist with the investigative process when deemed necessary.

**10.5(1)** The committee shall determine if the conduct of the licensee conforms to minimum standards of acceptable and prevailing practice of veterinary medicine and submit a report of its findings to the board.

**10.5(2)** The board shall review the committee’s findings and proceed with action available under rule 10.4(17A,169,272C).

**10.5(3)** The peer review committee shall observe the confidentiality requirements imposed by Iowa Code section 272C.6.

**811—10.6(17A,169,272C) Grounds for discipline.** The board may impose any of the disciplinary sanctions set forth in rule 10.7(17A, 169, 272C), including civil penalties in an

amount not to exceed \$1000, when the board determines that the licensee is guilty of any of the following acts or offenses:

**10.6(1)** Fraud in procuring a license, which includes but is not limited to an intentional perversion of the truth in making application for a license to practice veterinary medicine in this state, and includes false representations of a material fact, whether by word or by conduct, by false or misleading allegations, or by concealment of that which should have been disclosed when making application for a license in this state, or attempting to file or filing with the board or the Iowa department of agriculture and land stewardship any false or forged diploma, certificate, affidavit, identification, or qualification in making an application for a license in this state.

**10.6(2)** Professional incompetency, which includes but is not limited to violations of the standards of practice as set out in 811—Chapter 12. Professional incompetency may also be established by:

a. A substantial lack of knowledge or ability to discharge professional obligations within the scope of the veterinarian’s practice;

b. A substantial deviation by the veterinarian from the standards of learning or skill ordinarily possessed and applied by other veterinarians acting in the same or similar circumstances;

c. A failure by a veterinarian to exercise in a substantial respect that degree of care which is ordinarily exercised by the average veterinarian acting in the same or similar circumstances;

d. A willful or repeated departure from or the failure to conform to the minimal standards of acceptable and prevailing practice of veterinarians.

**10.6(3)** Knowingly making misleading, deceptive, untrue or fraudulent representations in the practice of a profession or engaging in unethical conduct or practice harmful or detrimental to the public. Proof of actual injury need not be established.

a. Knowingly making misleading, deceptive, untrue or fraudulent representations in the practice of a profession includes, but is not limited to, an intentional perversion of the truth, either orally or in writing, by a veterinarian in the practice of veterinary medicine and includes any representation contrary to legal or equitable duty, trust or confidence and is deemed by the board to be contrary to good conscience, prejudicial to the public welfare or may operate to the injury of another.

b. Engaging in unethical conduct includes, but is not limited to, a violation of the standards of practice as set out in 811—Chapter 12, and may include acts or offenses in violation of the code of ethics of the American Veterinary Medical Association (AVMA).

c. Practice harmful or detrimental to the public includes, but is not limited to, the failure of a veterinarian to possess and exercise that degree of skill, learning and care expected of a reasonable, prudent veterinarian acting in the same or similar circumstances, including a violation of the standards of practice as set out in 811—Chapter 12, or when a veterinarian is unable to practice veterinary medicine with reasonable skill and safety to a client’s animals as a result of a mental or physical impairment or chemical abuse.

d. Practice harmful or detrimental to the public includes, but is not limited to, the use of a rubber stamp to affix a signature to a prescription. A person who is unable, due to a physical handicap, to make a written signature or mark may substitute in lieu of a signature a rubber stamp which is adopted by the handicapped person for all purposes requiring a signature and which is affixed by the handicapped per-

## VETERINARY MEDICINE BOARD[811](cont'd)

son or affixed by another person upon the request of the handicapped person and in their presence.

e. Practice harmful or detrimental to the public includes, but is not limited to, the practice of maintaining any prescribed prescription which is intended to be completed and issued at a later time.

**10.6(4)** Habitual intoxication or addiction to the use of drugs, which includes but is not limited to the inability of a veterinarian to practice veterinary medicine with reasonable skill and safety by reason of the excessive use of alcohol, drugs, narcotics, chemicals or other types of material on a continuing basis, or the excessive use of alcohol, drugs, narcotics, chemicals or other type of material which may impair a veterinarian's ability to practice the profession with reasonable skill and safety. The board may require participation in a treatment program as a condition of license probation or suspension, and shall consider the licensee's willingness to participate in a treatment program when determining the appropriate degree of disciplinary sanction.

**10.6(5)** Conviction of a felony related to the profession or occupation of the licensee, or the conviction of any felony that would affect the licensee's ability to practice within a profession. A copy of the record of conviction or plea of guilty shall be conclusive evidence.

Conviction of a felony related to the profession or occupation of the licensee or the conviction of any felony that would affect the licensee's ability to practice within a profession includes, but is not limited to, the conviction of a veterinarian who has committed a public offense in the practice of their profession which is defined or classified as a felony under state or federal law, or who has violated a statute or law designated as a felony in this state, another state, or the United States, which statute or law relates to the practice of veterinary medicine or who has been convicted of a felonious act, which is so contrary to honesty, justice or good morals, and so reprehensible as to violate the public confidence and trust imposed upon a veterinarian in this state.

**10.6(6)** Fraud in representations as to skill or ability, which includes but is not limited to a veterinarian having made misleading, deceptive or untrue representations as to the veterinarian's competency to perform professional services for which the veterinarian is not qualified to perform by training or experience.

**10.6(7)** Use of untruthful or improbable statements in advertisements, which includes but is not limited to an action by a veterinarian in making information or intention known to the public which is false, deceptive, misleading or promoted through fraud or misrepresentation and includes statements which may consist of, but not be limited to:

1. Inflated or unjustified expectations of favorable results;

2. Self-laudatory claims that imply that the veterinarian engaged in a field or specialty of practice for which the veterinarian is not qualified. A veterinarian is not qualified to claim or imply specialization unless the veterinarian is a member in good standing of the respective specialty board or college recognized by the AVMA;

3. Representations that are likely to cause the average person to misunderstand; or

4. Extravagant claims or claims of extraordinary skills not recognized by the veterinary profession.

**10.6(8)** Willful or repeated violations of the provisions of Iowa Code chapters 169 and 272C and rules promulgated thereunder by the board.

**10.6(9)** Violating a statute or law of this state, another state, or the United States, without regard to its designation

as either felony or misdemeanor, which statute or law relates to the practice of veterinary medicine.

**10.6(10)** Failure to report a license revocation, suspension or other disciplinary action taken by a licensing authority of another state, territory or country within 30 days of the final action by such licensing authority. A stay by an appellate court shall not negate this requirement; however, if such disciplinary action is overturned or reversed by a court of last resort, such report shall be expunged from the records of the board.

**10.6(11)** Failure of licensee or an applicant for licensure in this state to report any voluntary agreement to restrict the practice of veterinary medicine entered into in another state, district, territory or country, or failure to report any adverse judgment in a malpractice action to which the licensee is a party, and every settlement of a claim against the licensee alleging malpractice, within 30 days of said voluntary agreement, adverse judgment, or settlement.

**10.6(12)** Knowingly aiding, assisting, procuring, or advising a person to unlawfully practice veterinary medicine.

**10.6(13)** Being guilty of a willful or repeated departure from, or the failure to conform to, the minimal standard of acceptable and prevailing practice of veterinary medicine in which proceeding actual injury to a patient need not be established, which includes, but is not limited to, a violation of the standards of practice as set out in 811—Chapter 12; or the committing by a veterinarian of an act contrary to honesty, justice or good morals, whether the same is committed in the course of their practice or otherwise, and whether committed within or without this state, where such act substantially relates to the practice of veterinary medicine.

**10.6(14)** Inability to practice veterinary medicine with reasonable skill and safety by reason of a mental or physical impairment or chemical abuse.

**10.6(15)** Violating a lawful order of the board previously entered by the board in a disciplinary hearing.

**10.6(16)** Being adjudged mentally incompetent by a court of competent jurisdiction. Such adjudication shall automatically suspend a license for the duration of the license unless the board orders otherwise.

**10.6(17)** Indiscriminately or promiscuously prescribing, administering or dispensing any drug; or prescribing, administering or dispensing any drug for other than a lawful purpose.

**10.6(18)** Knowingly submitting a false report of continuing education or failure to submit the triennial report of continuing education.

**10.6(19)** Failure to comply with a subpoena issued by the board.

**10.6(20)** Willful or gross negligence.

**10.6(21)** Obtaining any fee by fraud or misrepresentation.

**10.6(22)** Negligence in failing to exercise due care in the delegation of veterinary services to or supervision of registered veterinary technicians, veterinary assistants, employees or other individuals, whether or not injury results.

**10.6(23)** Violating any of the grounds for the revocation or suspension of a license as listed in Iowa Code section 169.13 or these rules.

**10.6(24)** The board shall suspend or revoke a license to practice veterinary medicine upon receipt of a certificate of noncompliance from the college student aid commission according to the procedures set forth in 1998 Iowa Acts, chapter 1081. In addition to the procedures contained therein, the following shall apply.

a. The notice required by 1998 Iowa Acts, chapter 1081, section 6, shall be served by restricted certified mail, return

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receipt requested, or by personal service in accordance with the Iowa Rules of Civil Procedure. Alternatively, the applicant may accept service personally or through authorized counsel.

b. The effective date of revocation or suspension of a license, as specified in the notice required by 1998 Iowa Acts, chapter 1081, section 6, shall be 60 days following service of the notice upon the applicant.

c. The board's executive secretary is authorized to prepare and serve the notice required by 1998 Iowa Acts, chapter 1081, section 6, and is directed to notify the licensee that the license will be suspended, unless the license is already suspended on other grounds. In the event a license is on suspension, the executive secretary shall notify the licensee of the board's intention to revoke the license.

d. Licensees shall keep the board informed of all court actions and all college student aid commission actions taken under or in connection with Iowa Code chapter 261 and shall provide the board copies, within seven days of filing or issuance, of all applications filed with the district court pursuant to 1998 Iowa Acts, chapter 1081, section 7, all court orders entered in such actions, and withdrawals of certificates of noncompliance by the college student aid commission.

e. All board fees required for renewal or reinstatement must be paid by the applicant and all continuing education requirements must be met before a license will be renewed or reinstated after the board has denied the renewal or reinstatement of a license pursuant to Iowa Code chapter 261.

f. In the event a licensee timely files a district court action following service of a board notice pursuant to 1998 Iowa Acts, chapter 1081, sections 6 and 7, the board shall continue with the intended action described in the notice upon the receipt of a court order lifting the stay, dismissing the action, or otherwise directing the board to proceed. For purposes of determining the effective date of the denial of the renewal, or reinstatement of a license, the board shall count the number of days before the court action was disposed of by the court.

g. The board shall notify the licensee in writing through regular first-class mail, or such other means as the board deems appropriate in the circumstances, within ten days of the effective date of the suspension or revocation of a license and shall similarly notify the applicant when the license is reinstated following the board's receipt of a withdrawal of the certificate of noncompliance.

**10.6(25)** Having the person's license to practice veterinary medicine revoked or suspended, or having other disciplinary action taken by a licensing authority of another state, territory, or country, or having the person's U.S.D.A. accreditation revoked, suspended or other disciplinary action taken against the accreditation. A certified copy of the record or order of suspension, revocation, or disciplinary action is conclusive or prima facie evidence.

**811—10.7(17A,169,272C) Sanctions.** The board has authority to impose the following disciplinary sanctions:

1. Revoke a license.
2. Suspend a license until further order of the board or for a specified period.
3. Prohibit permanently, until further order of the board or for a specified period, the engaging in specified procedures, methods or acts.
4. Impose a period of probation.
5. Require additional education or training.
6. Require a reexamination.
7. Order a physical or mental examination.

8. Impose civil penalties not to exceed \$1000.

9. Issue citation and warning.

10. Impose such other sanctions allowed by law as may be appropriate.

**811—10.8(17A,169,272C) Panel of specialists.** The board may appoint a panel of veterinarians who are specialists to ascertain the facts of a case pursuant to Iowa Code section 272C.6(2). The board chairperson or designee shall appoint the presiding officer.

**10.8(1)** The executive secretary shall set the date, time, and location of the hearing and make proper notification to all parties.

**10.8(2)** The panel of specialists shall:

- a. Enter into the record the names of the presiding officer, members of the panel, the parties and their representatives.
- b. Enter into the record the notice and evidence of service, order for hearing, statement of charges, answer, if available, and any other pleadings, motions or orders.
- c. Receive opening statements from the parties.
- d. Receive evidence, in accordance with Iowa Code section 17A.14, on behalf of the state of Iowa and on behalf of the licensee.
- e. Question the witnesses.
- f. Receive closing statements from the parties.
- g. Determine the findings of fact by a majority vote and make a written report of its findings to the board within a reasonable period.

**811—10.9(17A,169,272C) Informal settlement.** Pursuant to the provisions of Iowa Code sections 17A.12 and 272C.3, the board may consider resolution of disciplinary matters through informal settlement prior to commencement of contested case proceedings. The executive secretary or a designee may negotiate with the licensee regarding a proposed disposition of the controversy. Upon consent of both parties, the board will review the proposal for action.

**811—10.10(17A,169,272C) Voluntary surrender.** A voluntary surrender of licensure may be submitted to the board as resolution of a contested case or in lieu of continued compliance with a disciplinary decision of the board.

**811—10.11(17A,169,272C) Application for reinstatement.** Any person whose license to practice veterinary medicine has been suspended, revoked, or voluntarily surrendered may apply to the board for reinstatement in accordance with the terms and conditions of the order.

**10.11(1)** If the license was voluntarily surrendered, or if the order for suspension or revocation did not establish terms and conditions for reinstatement, an initial application may not be made until one year has elapsed from the date of the order.

**10.11(2)** The application shall allege facts and circumstances which will enable the board to determine that the basis for the sanction or voluntary surrender no longer exists, and that it is in the public interest to reinstate the license. The burden of proof to establish these facts shall rest with the petitioner.

**10.11(3)** The hearing in an application for reinstatement is a contested case in the meaning of Iowa Code section 17A.12.

**10.11(4)** The order to grant or deny reinstatement shall incorporate findings of fact and conclusions of law. If reinstatement is granted, terms and conditions of licensure may be imposed.

**811—10.12** Reserved.

## VETERINARY MEDICINE BOARD[811](cont'd)

**811—10.13(17A,169,272C) Contested case proceedings.** The following rules apply to board activities which are initiated upon determination of probable cause and result in the issuance of a notice of hearing.

**811—10.14(17A) Definitions.** Except where otherwise specifically defined by law:

“Contested case” means a proceeding defined by Iowa Code section 17A.2(5) and includes any matter defined as a no factual dispute contested case under 1998 Iowa Acts, chapter 1202, section 14.

“Issuance” means the date of mailing of a decision or order or date of delivery if service is by other means, unless another date is specified in the order.

“Party” means each person or agency named or admitted as a party or properly seeking and entitled as of right to be admitted as a party.

“Presiding officer” means the chairperson of the board or designee.

“Proposed decision” means the presiding officer’s recommended findings of fact, conclusions of law, decision, and order in a contested case in which the board did not preside.

**811—10.15(17A) Time requirements.**

**10.15(1)** Time shall be computed as provided in Iowa Code subsection 4.1(34).

**10.15(2)** For good cause, the presiding officer may extend or shorten the time to take any action, except as precluded by statute. Except for good cause stated in the record, before extending or shortening the time to take any action, the presiding officer shall afford all parties an opportunity to be heard or to file written arguments.

**811—10.16(17A) Notice of hearing.** The board shall issue an order, notice of hearing, and statement of charges following its determination of probable cause pursuant to Iowa Code section 17A.12(2). Delivery of the notice of hearing constitutes the commencement of the contested case proceeding.

**10.16(1)** The date, time, and location of the hearing shall be set by the chairperson or the executive secretary. The licensee shall be notified at least 30 days prior to the scheduled hearing.

**10.16(2)** Notification shall be in writing delivered either by personal service as in civil actions or by certified mail with return receipt requested. When the licensee cannot be located:

a. An affidavit shall be prepared outlining the measures taken to attempt service, and shall become a part of the file when a notice cannot be delivered by personal service or certified mail, return receipt requested.

b. Notice of hearing shall be published once each week for three consecutive weeks in a newspaper of general circulation, published or circulated in the county of last-known residence of the licensee. The newspaper will be selected by the executive secretary or a designee. The first notice of hearing shall be published at least 30 days prior to the scheduled hearing.

**811—10.17(17A) Presiding officer.** Disciplinary hearings shall be conducted by the board pursuant to Iowa Code section 272C.6. The chairperson of the board shall designate the presiding officer in accordance with the provisions of 1998 Iowa Acts, chapter 1202, section 15.

**10.17(1)** For nondisciplinary proceedings, any party who wishes to request that the presiding officer assigned to render a proposed decision be an administrative law judge employed by the department of inspections and appeals must

file a written request within 20 days after service of a notice of hearing.

**10.17(2)** The executive secretary may deny the request upon a finding that one or more of the following apply:

a. Neither the agency nor any officer of the agency under whose authority the contested case is to take place is a named party to the proceeding or a real party in interest to that proceeding.

b. There is a compelling need to expedite issuance of a final decision in order to protect the public health, safety, or welfare.

c. The case involves significant policy issues of first impression that are inextricably intertwined with the factual issues presented.

d. The demeanor of the witness is likely to be dispositive in resolving the disputed factual issues.

e. Funds are unavailable to pay the costs of an administrative law judge and an interagency appeal.

f. The request was not timely filed.

g. The request is not consistent with a specified statute.

h. The request would not conform to the disciplinary hearing provision of Iowa Code section 272C.6.

**10.17(3)** The agency (or its designee) shall issue a written ruling specifying the grounds for its decision within 20 days after a request for an administrative law judge is filed.

**10.17(4)** All rulings by an administrative law judge are subject to appeal to the agency. A party must seek any available intra-agency appeal in order to exhaust adequate administrative remedies.

**10.17(5)** Unless otherwise provided by law, the board, when reviewing a proposed decision upon intra-agency appeal, shall have the powers of and shall comply with the provisions of this chapter which apply to presiding officers.

**811—10.18(17A) Waiver of procedures.** Unless otherwise precluded by law, the parties in a contested case proceeding may waive any provision of this chapter. However, the agency in its discretion may refuse to give effect to such a waiver when it deems the waiver to be inconsistent with the public interest.

**811—10.19(17A) Telephone proceedings.** The presiding officer may resolve preliminary procedural motions by telephone conference in which all parties have an opportunity to participate. Other telephone proceedings may be held with the consent of all parties. The presiding officer will determine the location of the parties and witnesses for telephone hearings. The convenience of the witnesses or parties, as well as the nature of the case, will be considered when location is chosen.

**811—10.20(17A) Disqualification.**

**10.20(1)** A presiding officer or other person shall withdraw from participation in the making of any proposed or final decision in a contested case if that person:

a. Has a personal bias or prejudice concerning a party or a representative of a party;

b. Has personally investigated, prosecuted or advocated in connection with that case, the specific controversy underlying that case, another pending factually related contested case, or a pending factually related controversy that may culminate in a contested case involving the same parties;

c. Is subject to the authority, direction or discretion of any person who has personally investigated, prosecuted or advocated in connection with that contested case, the specific controversy underlying that contested case, or a pending factually related contested case or controversy involving the same parties;

## VETERINARY MEDICINE BOARD[811](cont'd)

d. Has acted as counsel to any person who is a private party to that proceeding within the past two years;

e. Has a personal financial interest in the outcome of the case or any other significant personal interest that could be substantially affected by the outcome of the case;

f. Has a spouse or relative within the third degree of relationship that: (1) is a party to the case, or an officer, secretary or trustee of a party; (2) is a lawyer in the case; (3) is known to have an interest that could be substantially affected by the outcome of the case; or (4) is likely to be a material witness in the case; or

g. Has any other legally sufficient cause to withdraw from participation in the decision making in that case.

**10.20(2)** The term "personally investigated" means taking affirmative steps to interview witnesses directly or to obtain documents or other information directly. The term "personally investigated" does not include general direction and supervision of assigned investigators, unsolicited receipt of information which is relayed to assigned investigators, review of another person's investigative work product in the course of determining whether there is probable cause to initiate a proceeding or exposure to factual information while performing other agency functions, including fact gathering for purposes other than investigation or the matter which culminates in a contested case. Factual information relevant to the merits of a contested case received by a person who later serves as presiding officer in that case shall be disclosed if required by 1998 Iowa Acts, chapter 1202, section 19(3), and subrules 10.20(3) and 10.32(9).

**10.20(3)** In a situation where a presiding officer or other person knows of information which might reasonably be deemed to be a basis for disqualification and decides voluntary withdrawal is unnecessary, that person shall submit the relevant information for the record by affidavit and shall provide for the record a statement of the reasons for the determination that withdrawal is unnecessary.

**10.20(4)** If a party asserts disqualification on any appropriate ground, including those listed in subrule 10.20(1), the party shall file a motion supported by an affidavit pursuant to 1998 Iowa Acts, chapter 1202, section 19(7). The motion must be filed as soon as practicable after the reason alleged in the motion becomes known to the party. If, during the course of the hearing, a party first becomes aware of evidence of bias or other grounds for disqualification, the party may move for disqualification but must establish the grounds by the introduction of evidence into the record.

If the presiding officer determines that disqualification is appropriate, the presiding officer or other person shall withdraw. If the presiding officer determines that withdrawal is not required, the presiding officer shall enter an order to that effect. A party asserting disqualification may seek an interlocutory appeal under rule 10.34(17A).

**811—10.21(17A) Consolidation—severance.**

**10.21(1)** Consolidation. The presiding officer may consolidate any or all matters at issue in two or more contested case proceedings where: (a) the matters at issue involve common parties or common questions of fact or law; (b) consolidation would expedite and simplify consideration of the issues involved; and (c) consolidation would not adversely affect the rights of any of the parties to those proceedings.

**10.21(2)** Severance. The presiding officer may, for good cause shown, order any contested case proceedings or portions thereof severed.

**811—10.22(17A) Pleadings.**

**10.22(1)** Pleadings may be required by rule, by notice of hearing, or by order of the presiding officer.

**10.22(2) Petition.**

a. Any petition required in a contested case proceeding shall be filed within 20 days of delivery or the notice of hearing or subsequent order of the presiding officer, unless otherwise ordered.

b. A petition shall state in separately numbered paragraphs the following:

(1) The persons or entities on whose behalf the petition is filed;

(2) The particular provision of statutes and rules involved;

(3) The relief demanded and the facts and laws relied upon for such relief; and

(4) The name, address and telephone number of the petitioner and the petitioner's attorney.

**10.22(3)** Answer. An answer may be filed within 20 days of service of the petition. A party may move to dismiss or apply for a more definite and detailed statement when appropriate.

An answer shall show on whose behalf it is filed and specifically admit, deny, or otherwise answer all material allegations of the pleading to which it responds. It shall state any facts deemed to show an affirmative defense and contain as many additional defenses as the pleader may claim.

An answer shall state the name, address and telephone number of the person filing the answer, the person or entity on whose behalf it is filed, and the attorney representing that person.

Any allegation in the petition not denied in the answer is considered admitted. The presiding officer may refuse to consider any defense not raised in the answer which could have been raised on the basis of facts known when the answer was filed if any party would be prejudiced.

**811—10.23(17A) Service and filing of pleadings and other papers.**

**10.23(1)** When service required. Except where otherwise provided by law, every pleading, motion, document, or other paper filed in a contested case proceeding and every paper relating to discovery in such a proceeding shall be served upon each of the parties of record to the proceeding, including the person designated as advocate or prosecutor for the state or the agency. Except for the original notice of hearing and an application for rehearing as provided in Iowa Code section 17A.16(2), the party filing a document is responsible for service on all parties.

**10.23(2)** Service—how made. Service upon a party represented by an attorney shall be made upon the attorney unless otherwise ordered. Service is made by delivery or by mailing a copy to the person's last-known address. Service by mail is complete upon mailing, except where otherwise specifically provided by statute, rule, or order.

**10.23(3)** Filing—when required. After the notice of hearing, all pleadings, motions, documents or other papers in a contested case proceeding shall be filed with the board.

**10.23(4)** Filing—when made. Except where otherwise provided by law, a document is deemed filed at the time it is delivered to the board office, delivered to an established courier service for immediate delivery to that office, or mailed by first-class mail or state interoffice mail to that office, so long as there is proof of mailing.

**10.23(5)** Proof of mailing. Proof of mailing includes either: a legible United States Postal Service postmark on the envelope, a certificate of service, a notarized affidavit, or a certification in substantially the following form:

## VETERINARY MEDICINE BOARD[811](cont'd)

I certify under penalty of perjury and pursuant to the laws of Iowa that, on (date of mailing), I mailed copies of (describe document) addressed to the (agency office and address) and to the names and addresses of the parties listed below by depositing the same in the United States mail or state interoffice mail.

(Date) (Signature)

**811—10.24(17A) Discovery.**

**10.24(1)** Discovery procedures applicable in civil actions are applicable in contested cases. Unless lengthened or shortened by these rules or by order of the presiding officer, time periods for compliance with discovery shall be as provided in the Iowa Rules of Civil Procedure.

**10.24(2)** Any motion relating to discovery shall allege that the moving party has previously made a good-faith attempt to resolve the discovery issues involved with the opposing party. Motions in regard to discovery shall be ruled upon by the presiding officer. Opposing parties shall be afforded the opportunity to respond within ten days of the filing of the motion unless the time is shortened as provided in subrule 10.24(1). The presiding officer may rule on the basis of the written motion and any response, or may order argument on the motion.

**10.24(3)** Evidence obtained in discovery may be used in the contested case proceeding if that evidence would otherwise be admissible in that proceeding.

**811—10.25(17A) Subpoenas.****10.25(1) Issuance.**

a. An agency subpoena shall be issued to a party on request. Such a request must be in writing. In the absence of good cause for permitting later action, a request for a subpoena must be received at least three days before the scheduled hearing. The request shall include the name, address, and telephone number of the requesting party.

b. Except to the extent otherwise provided by law, parties are responsible for service of their own subpoenas and payment of witness fees and mileage expenses.

**10.25(2)** Motion to quash or modify. The presiding officer may quash or modify a subpoena for any lawful reason upon motion in accordance with the Iowa Rules of Civil Procedure. A motion to quash or modify a subpoena shall be set for argument promptly.

**811—10.26(17A) Motions.**

**10.26(1)** No technical form for motions is required. However, prehearing motions must be in writing, state the grounds for relief, and state the relief sought.

**10.26(2)** Any party may file a written response to a motion within ten days after the motion is served, unless the time period is extended or shortened by rules of the agency or the presiding officer. The presiding officer may consider a failure to respond within the required time period in ruling on a motion.

**10.26(3)** The presiding officer may schedule oral argument on any motion.

**10.26(4)** Motions pertaining to the hearing must be filed and served at least ten days prior to the date of hearing unless there is good cause for permitting later action or the time for such action is lengthened or shortened by rule of the agency or an order of the presiding officer.

**811—10.27(17A) Prehearing conference.**

**10.27(1)** Any party may request a prehearing conference. A written request for prehearing conference or an order for prehearing conference on the presiding officer's own motion shall be filed not less than seven days prior to the hearing

date. A prehearing conference shall be scheduled not less than three business days prior to the hearing date.

Written notice of the prehearing conference shall be given by the board office to all parties. For good cause the presiding officer may permit variances from this rule.

**10.27(2)** Each party shall bring to the prehearing conference:

a. A final list of witnesses the party anticipates will testify at hearing. Witnesses not listed may be excluded from testifying unless there was good cause for the failure to include their names; and

b. A final list of exhibits which the party anticipates will be introduced at hearing. Exhibits other than rebuttal exhibits that are not listed may be excluded from admission into evidence unless there was good cause for the failure to include them.

c. Witness or exhibit lists may be amended subsequent to the prehearing conference within the time limits established by the presiding officer at the prehearing conference. Any such amendments must be served on all parties.

**10.27(3)** In addition to the requirements of subrule 10.27(2), the parties at a prehearing conference may:

a. Enter into stipulations of law or fact;

b. Enter into stipulations on the admissibility of exhibits;

c. Identify matters which the parties intend to request be officially noticed;

d. Enter into stipulations for waiver of any provision of law; and

e. Consider any additional matters which will expedite the hearing.

**10.27(4)** Prehearing conferences shall be conducted by telephone unless otherwise ordered. Parties shall exchange and receive witness and exhibit lists in advance of a telephone prehearing conference.

**811—10.28(17A) Continuances.** The executive secretary shall have the authority to grant a continuance after consultation, if needed, with the chairperson of the board.

A request for continuance of a contested case matter must be submitted in writing to the board not later than seven days prior to the scheduled date of the hearing. Exceptions shall be granted at the discretion of the executive secretary only in situations involving extenuating, extraordinary, or emergency circumstances.

**811—10.29(17A) Hearing procedures.**

**10.29(1)** The presiding officer presides at the hearing, and may rule on motions, require briefs, issue a decision, and issue such orders and rulings as will ensure the orderly conduct of the proceedings.

**10.29(2)** All objections shall be timely made and stated on the record.

**10.29(3)** Parties have the right to participate or be represented in all hearings or prehearing conferences related to their case. Any party may be represented by an attorney or another person authorized by law.

**10.29(4)** Subject to terms and conditions prescribed by the presiding officer, parties have the right to introduce evidence on issues of material fact, cross-examine witnesses present at the hearing as necessary for a full and true disclosure of the facts, present evidence in rebuttal, and submit briefs and engage in oral argument.

**10.29(5)** The presiding officer shall maintain the decorum of the hearing and may refuse to admit or may expel anyone whose conduct is disorderly.

## VETERINARY MEDICINE BOARD[811](cont'd)

**10.29(6)** Witnesses may be sequestered during the hearing.

**10.29(7)** The presiding officer shall conduct the hearing in the following manner:

- a. The presiding officer shall give an opening statement briefly describing the nature of the proceedings;
- b. The parties shall be given an opportunity to present opening statements;
- c. Parties shall present their cases in the sequence determined by the presiding officer;
- d. Each witness shall be sworn or affirmed by the presiding officer or the court reporter, and be subject to examination and cross-examination. The presiding officer may limit questioning in a manner consistent with law;
- e. When all parties and witnesses have been heard, parties may be given the opportunity to present final arguments.

**811—10.30(17A) Evidence.**

**10.30(1)** The presiding officer shall rule on admissibility of evidence and may, where appropriate, take official notice of facts in accordance with all applicable requirements of law.

**10.30(2)** Stipulation of facts is encouraged. The presiding officer may make a decision based on stipulated facts.

**10.30(3)** Evidence in the proceeding shall be confined to those issues to which the parties received notice prior to the hearing, unless the parties waive their right to such notice or the presiding officer determines that good cause justifies expansion of the issues. If the presiding officer decides to admit evidence on issues outside the scope of the notice over the objection of a party who did not have actual notice of those issues, that party, upon timely request, shall receive a continuance sufficient to amend pleadings and to prepare on the additional issue.

**10.30(4)** The party seeking admission of an exhibit must provide opposing parties with an opportunity to examine the exhibit prior to the ruling on its admissibility. Copies of documents should normally be provided to opposing parties.

**10.30(5)** Any party may object to specific evidence or may request limits on scope of any examination or cross-examination. Such an objection shall be accompanied by a brief statement of the grounds upon which it is based. The objection, the ruling on the objection, and the reasons for the ruling shall be noted in the record. The presiding officer may rule on the objection at the time it is made or may reserve a ruling until the written decision.

**10.30(6)** Whenever evidence is ruled inadmissible, the party offering that evidence may submit an offer of proof on the record. The party making the offer of proof for excluded oral testimony shall briefly summarize the testimony or, with permission of the presiding officer, present the testimony. If the excluded evidence consists of a document or exhibit, it shall be marked as part of an order of proof and inserted in the record.

**811—10.31(17A) Default.**

**10.31(1)** If a party fails to appear or participate in a contested case proceeding after proper service of notice, the presiding officer may, if no adjournment is granted, enter a default decision or proceed with the hearing and render a decision in the absence of the party.

**10.31(2)** Where appropriate and not contrary to law, any party may move for default against a party who has requested the contested case proceeding and has failed to file a required pleading or has failed to appear after proper service.

**10.31(3)** Default decisions or decisions rendered on the merits after a party has failed to appear or participate in a

contested case proceeding become final agency action unless, within 15 days after the date of notification or mailing of the decision, a motion to vacate is filed and served on all parties or an appeal of a decision on the merits is timely initiated within the time provided by rule 10.36(17A). A motion to vacate must state all facts relied upon by the moving party which establish that good cause existed for that party's failure to appear or participate at the contested case proceeding. Each fact so stated must be substantiated by at least one sworn affidavit of a person with personal knowledge of each such fact attached to the motion.

**10.31(4)** The time for further appeal of a decision for which a timely motion to vacate has been filed is stayed pending a decision on the motion to vacate.

**10.31(5)** Properly substantiated and timely filed motions to vacate shall be granted only for good cause shown. The burden of proof as to good cause is on the moving party. Adverse parties shall have ten days to respond to a motion to vacate. Adverse parties shall be allowed to conduct discovery as to the issue of good cause and to present evidence on the issue prior to a decision on the motion, if a request to do so is included in that party's response.

**10.31(6)** "Good cause" for purposes of this rule shall have the same meaning as "good cause" for setting aside a default judgment under Iowa Rule of Civil Procedure 236.

**10.31(7)** A decision denying a motion to vacate is subject to further appeal within the time limit allowed for further appeal of a decision on the merits in the contested case proceeding. A decision granting a motion to vacate is subject to interlocutory appeal by the adverse party pursuant to rule 10.34(17A).

**811—10.32(17A) Ex parte communication.**

**10.32(1)** Prohibited communications. Unless required for the disposition of ex parte matters specifically authorized by statute, following issuance of the notice of hearing, there shall be no communication, directly or indirectly, between the presiding officer and any party or representative of any party or any other person with a direct or indirect interest in such case in connection with any issue of fact or law in the case, except upon notice and opportunity for all parties to participate. This does not prohibit persons jointly assigned such tasks from communicating with each other. Nothing in this provision is intended to preclude the presiding officer from communicating with members of the agency or seeking the advice or help of persons other than those with a personal interest in, or those engaged in personally investigating as defined in subrule 10.20(2), prosecuting, or advocating in, either the case under consideration or a pending factually related case involving the same parties, as long as those persons do not directly or indirectly communicate to the presiding officer any ex parte communications they have received of a type that the presiding officer would be prohibited from receiving or that furnish, augment, diminish, or modify the evidence in the record.

**10.32(2)** Prohibitions on ex parte communications commence with the issuance of the notice of hearing in a contested case and continue for as long as the case is pending.

**10.32(3)** Written, oral or other forms of communication are "ex parte" if made without notice and opportunity for all parties to participate.

**10.32(4)** To avoid prohibited ex parte communications notice must be given in a manner reasonably calculated to give all parties a fair opportunity to participate. Notice of written communications shall be provided in compliance with rule 10.23(17A) and may be supplemented by telephone, facsimile, E-mail or other means of notification.

## VETERINARY MEDICINE BOARD[811](cont'd)

Where permitted, oral communications may be initiated through telephone conference call, which includes all parties or their representatives.

**10.32(5)** Persons who jointly act as presiding officer in a pending contested case may communicate with each other without notice or opportunity for parties to participate.

**10.32(6)** The executive secretary or other persons may be present in deliberations or otherwise advise the presiding officer without notice or opportunity for parties to participate as long as they are not disqualified from participating in the making of a proposed or final decision under subrule 10.20(1) or other law and they comply with subrule 10.32(1).

**10.32(7)** Communications with the presiding officer involving scheduling or uncontested procedural matters do not require notice or opportunity for parties to participate. A party should notify other parties prior to initiating such contact with the presiding officer when feasible, and shall notify other parties when seeking to continue hearings or other deadlines pursuant to rule 10.29(17A).

**10.32(8)** Disclosure of prohibited communications. A presiding officer who received a prohibited ex parte communication during the pendency of a contested case must initially determine if the effect of the communication is so prejudicial that the presiding officer should be disqualified. If the presiding officer determines that disqualification is warranted, a copy of any prohibited written communication, all written responses to the communication, a written summary stating the substance of any prohibited oral or other communication not available in written form for disclosure, all responses made, and the identity of each person from whom the presiding officer received a prohibited ex parte communication shall be submitted for inclusion in the record under seal by protective order. If the presiding officer determines that disqualification is not warranted, such documents shall be submitted for inclusion in the record and served on all parties. Any party desiring to rebut the prohibited communication must be allowed the opportunity to do so upon written request filed within ten days after notice of the communication.

**10.32(9)** Promptly after being assigned to serve as presiding officer on a hearing panel, as a member of a full board hearing, on an intra-agency appeal, or other basis, a presiding officer shall disclose to all parties material factual information received through ex parte communication prior to such assignment, unless the factual information has already been or shortly will be disclosed pursuant to Iowa Code section 17A.13(2) or through discovery. Factual information contained in an investigative report or similar document need not be separately disclosed by the presiding officer as long as such documents have been or will shortly be provided to the parties.

**10.32(10)** The presiding officer may render a proposed or final decision imposing appropriate sanctions for violations of this rule including default, a decision against the offending party, censure, or suspension or revocation of the privilege to practice before the agency. Violation of ex parte communication prohibitions by agency personnel shall be reported to the board's executive secretary for possible sanctions including: censure, suspension, dismissal, or other disciplinary action.

**811—10.33(17A) Recording costs.** Upon request, the board shall provide a copy of the whole or any portion of the record at cost. The cost of preparing a copy of the record or of transcribing the hearing record shall be paid by the requesting party.

Parties who request that a hearing be recorded by certified shorthand reporters rather than by electronic means shall bear the cost of such recording, unless otherwise provided by law.

**811—10.34(17A) Final decision.** When the board presides over reception of the evidence at the hearing, its decision is a final decision.

**10.34(1)** When a panel of specialists presides over the reception of evidence at the hearing, the findings of fact shall be considered by the board at the earliest feasible time. The decision of the board is a final decision.

**10.34(2)** A final decision in a contested case proceeding shall be in writing and include findings of fact and conclusions of law, separately stated.

a. Findings of fact shall be accompanied by a concise and explicit statement of underlying facts supporting the findings.

b. The decision shall include an explanation of why the relevant evidence in the record supports each material finding of fact.

c. Conclusions of law shall be supported by cited authority or by a reasoned opinion.

**10.34(3)** The decision or order shall be promptly delivered to the parties in the manner provided by section 17A.12.

**10.34(4)** The final decision is a public record pursuant to Iowa Code section 272C.6(4).

**811—10.35(17A) Appeals.**

**10.35(1) Appeal by party.** Any adversely affected party may appeal a final decision of the board to the district court within 30 days after issuance, in accordance with Iowa Code section 17A.19 as amended by 1998 Iowa Acts, chapter 1202.

**10.35(2) Review.** The board may initiate review of the decision or order on its own motion at any time within 30 days following the issuance of such a decision.

**10.35(3) Notice of appeal.** An appeal of a decision or order is initiated by filing a timely notice of appeal with the board. The notice of appeal must be signed by the appealing party or a representative of that party and contain a certificate of service. The notice shall specify:

a. The parties initiating the appeal;

b. The proposed decision or order appealed from;

c. The specific findings or conclusions to which exception is taken and any other exceptions to the decision or order;

d. The relief sought;

e. The grounds for relief.

**10.35(4) Requests to present additional evidence.** A party may request the taking of additional evidence only by establishing that the evidence is material, that good cause existed for the failure to present the evidence at the hearing, and that the party has not waived the right to present the evidence. A written request to present additional evidence must be filed with the notice of appeal or, by a nonappealing party, within 15 days of service of the notice of appeal. The board may remand a case to the presiding officer for further hearing or may itself preside at the taking of additional evidence.

**10.35(5) Scheduling.** The board of veterinary medicine shall issue a schedule for consideration of the appeal.

**10.35(6) Briefs and arguments.** Unless otherwise ordered, within 20 days of the notice of appeal or order for review, each appealing party may file exceptions and briefs. Within 20 days thereafter, any party may file a responsive brief. Briefs shall cite any applicable legal authority and specify relevant portions of the record in that proceeding.

## VETERINARY MEDICINE BOARD[811](cont'd)

Written requests to present an oral argument shall be filed with the briefs.

The board may resolve the appeal on the briefs or provide an opportunity for oral argument. The board may shorten or extend the briefing period as appropriate.

**811—10.36(17A) Applications for rehearing.**

**10.36(1)** By whom filed. Any party to a contested case proceeding may file an application for rehearing from a final order.

**10.36(2)** Content of application. The application for rehearing shall state on whose behalf it is filed, the specific grounds for rehearing, and the relief sought. In addition, the application shall state whether the applicant desires reconsideration of all or part of the agency decision on the existing record and whether, on the basis of the grounds enumerated in subrule 10.36(4), the applicant requests an opportunity to submit additional evidence.

**10.36(3)** Time of filing. The application shall be filed with the board office within 20 days after issuance of the final decision.

**10.36(4)** Notice to other parties. A copy of the application shall be timely mailed by the applicant to all parties of record not joining therein. If the application does not contain a certificate of service, the board shall serve copies on all parties.

**10.36(5)** Disposition. Any application for a rehearing shall be deemed denied unless the agency grants the application within 20 days after its filing.

**811—10.37(17A) No factual dispute contested cases.** If the parties agree that no dispute of material fact exists as to a matter that would be a contested case if such a dispute of fact existed, the parties may present all relevant admissible evidence either by stipulation or otherwise as agreed by the parties, without necessity for the production of evidence at an evidentiary hearing. If such agreement is reached, a jointly submitted schedule detailing the method and timetable for submission of the record, briefs and oral argument should be submitted to the presiding officer for approval as soon as practicable.

**811—10.38(17A) Emergency adjudicative proceedings.**

**10.38(1)** Necessary emergency action. To the extent necessary to prevent or avoid immediate danger to the public health, safety, or welfare, the agency may issue a written order in compliance with Iowa Code section 17A.18 to suspend a license in whole or in part, order the cessation of any continuing activity, order affirmative action, or take other action within the jurisdiction of the agency by emergency adjudicative order. Before issuing an emergency adjudicative order the agency shall consider factors including, but not limited to, the following:

a. Whether there has been a sufficient factual investigation to ensure that the agency is proceeding on the basis of reliable information;

b. Whether the specific circumstances which pose immediate danger to the public health, safety or welfare have been identified and determined to be continuing;

c. Whether the person required to comply with the emergency adjudicative order may continue to engage in other activities without posing immediate danger to the public health, safety or welfare;

d. Whether imposition of monitoring requirements or other interim safeguards would be sufficient to protect the public health, safety or welfare; and

e. Whether the specific action contemplated by the agency is necessary to avoid the immediate danger.

**10.38(2)** Issuance. The written emergency adjudicative order shall be immediately delivered to persons who are required to comply with the order by utilizing one or more of the following procedures:

a. Personal delivery;

b. Certified mail, return receipt requested, to the last address on file with the agency;

c. Certified mail to the last address on file with the agency;

d. First-class mail to the last address on file with the agency; or

e. Fax. Fax may be used as the sole method of delivery if the person required to comply with the order has filed a written request that agency orders be sent by fax and has provided a fax number for that purpose.

To the degree practicable, the agency shall select the procedure for providing written notice that best ensures prompt, reliable delivery.

**10.38(3)** Oral notice. Unless the written emergency adjudicative order is provided by personal delivery on the same day that the order issues, the agency shall make reasonable immediate efforts to contact by telephone the persons who are required to comply with the order.

**10.38(4)** Completion of proceedings. Issuance of a written emergency adjudicative order shall include notification of the date on which agency proceedings are scheduled for completion. After issuance of an emergency adjudicative order, continuance of further agency proceedings to a later date will be granted only in compelling circumstances upon application in writing.

These rules are intended to implement Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202, and chapters 169 and 272C.

**ARC 8809A****WORKFORCE DEVELOPMENT  
DEPARTMENT[871]****Notice of Intended Action**

Twenty-five interested persons, a governmental subdivision, an agency or association of 25 or more persons may demand an oral presentation hereon as provided in Iowa Code section 17A.4(1)"b."

Notice is also given to the public that the Administrative Rules Review Committee may, on its own motion or on written request by any individual or group, review this proposed action under section 17A.8(6) at a regular or special meeting where the public or interested persons may be heard.

Pursuant to the authority of Iowa Code section 84A.1B, the Workforce Development Department hereby gives Notice of Intended Action to amend Chapter 1, "Administration," and Chapter 2, "Customer and Administrative Services Division," Iowa Administrative Code.

These amendments make nonsubstantive changes to the Department's rules in order to update the rules to reflect the current organizational structure.

The proposed amendments will not necessitate additional expenditures by political subdivisions or agencies and entities which contract with political subdivisions.

The Department has determined that these proposed amendments will not have an impact on small business.

Any interested person may make written suggestions or comments on these proposed amendments on or before April 23, 1999. Such written comments should be directed to Pat Sampson, Workforce Development Department, 1000 East Grand Avenue, Des Moines, Iowa 50319.

## WORKFORCE DEVELOPMENT DEPARTMENT[871](cont'd)

Persons who want to orally convey their views should contact Pat Sampson, Workforce Development Department at (515)281-5092.

If requested by April 14, 1999, a public hearing will be held on April 16, 1999, at 10:30 a.m. in the Director's Conference Room, 1000 East Grand Avenue, Des Moines, Iowa. Any interested person will be given the opportunity to make oral or written submissions concerning the proposed amendments.

These amendments are intended to implement Iowa Code chapter 84A.

The following amendments are proposed.

ITEM 1. Amend subrule 1.1(6), catchwords, as follows:

**1.1(6)** Division of ~~industrial services~~ *workers' compensation*.

ITEM 2. Amend subrule 2.1(2) as follows:

**2.1(2)** Operation and administration. The customer and administrative services division is under the direction of a division administrator who assists the director by planning, directing, and coordinating activities such as customer services; financial management; business management; ~~special projects, premises, and forms management~~; budget and reporting; employee services; *public relations*; and planning and information. For ease of operation and administration of responsibilities assigned to it, the customer and administrative and services division has been organized into ~~seven~~ *six* bureaus corresponding to the functional responsibilities of the division administrator.

ITEM 3. Amend subrule 2.4(4) as follows:

**2.4(4)** Printing and collating unit. The printing and collating unit is responsible for in-house printing as required *and development and maintenance of forms and forms inventory*.

ITEM 4. Rescind and reserve rule **871—2.5(84A)**.

ITEM 5. Amend subrule **2.7(2)** by adding the following new paragraphs "i," "j," and "k":

- i. Coordination of facility management for administrative and field offices.
- j. Providing recommendations on and coordinating the development and distribution of internal administrative policies and procedures.
- k. Coordination of communication systems for administrative and field offices.

ITEM 6. Rescind rule **871—2.8(84A)** and adopt the following new rule:

**871—2.8(84A) Planning and information services.**

**2.8(1)** Planning and information services staff is responsible for:

1. Serving as the department's liaison with Congress and the Iowa general assembly;
2. Reviewing legislation affecting the department;
3. Developing, presenting, and securing enactment of the department's legislative package;
4. Providing constituent services to Congress and the Iowa general assembly.

**2.8(2)** Public relations and marketing bureau. The public relations and marketing bureau is under the direction of a bureau chief who reports to the division administrator. The public relations and marketing bureau is a resource to help other parts of the department communicate to various audiences. The bureau is responsible for:

1. Coordinating the department's internal and external communication efforts. Functions include providing support in audience and message definition, writing and graphic support, coordinating projects with outside printers and other communication vendors, and serving as a primary media contact.

2. Identifying and managing the department's marketing efforts including selecting and working with outside vendors such as advertising agencies and communication professionals to develop and place advertisements in various media to reach important customers and stakeholders.

These rules are intended to implement Iowa Code chapter 84A.

**ARC 8791A**

**WORKFORCE DEVELOPMENT  
DEPARTMENT[871]**

**Notice of Intended Action**

Twenty-five interested persons, a governmental subdivision, an agency or association of 25 or more persons may demand an oral presentation hereon as provided in Iowa Code section 17A.4(1)"b."

Notice is also given to the public that the Administrative Rules Review Committee may, on its own motion or on written request by any individual or group, review this proposed action under section 17A.8(6) at a regular or special meeting where the public or interested persons may be heard.

Pursuant to the authority of Iowa Code sections 17A.3 and 96.11, the Workforce Development Department proposes to amend Chapter 26, "Contested Case Proceedings," Iowa Administrative Code.

Item 1 replaces the term "administrative law judge" with the term "presiding officer" when referring to the individual conducting a contested case hearing to conform with terminology used in 1998 Iowa Acts, chapter 1202, which amends Iowa Code chapter 17A.

Item 2 amends the term "contested case" by including no factual dispute contested case as defined in 1998 Iowa Acts, chapter 1202, which amends Iowa Code chapter 17A, clarifies the definition of "party" and defines the term "presiding officer."

Item 3 allows the commencement of an unemployment insurance benefit contested case by filing an appeal by fax as well as by mail or in person as now permitted.

Item 4 allows the commencement of an unemployment insurance employer tax contested case by filing an appeal by fax as well as by mail or in person as now permitted.

Item 5 adds a description of who will serve as presiding officer to the information contained in the notice of hearing on the contested case.

Item 6 clarifies the circumstances in which a presiding officer would withdraw from participation in the hearing or decision making in a contested case because of personally investigating a controversy culminating in a contested case.

Item 7 alters discovery procedures by having the party responding to a discovery request provide the requested material directly to the opposing party rather than to the Appeals Section for forwarding to the opposing party.

Item 8 adds new subrules to the rule concerning ex parte communications clarifying when prohibition on ex parte communications commences, identifying types of communications which do not require notice to the opposing party, specifying the response required of a presiding officer who receives a prohibited ex parte communication, and allowing

## WORKFORCE DEVELOPMENT DEPARTMENT[871](cont'd)

the presiding officer and chief administrative law judge to impose specified sanctions for violations of the rule.

Item 9 clarifies the rule on the conduct of contested case hearings by specifying that the presiding officer in each case is an administrative law judge employed by the Department of Workforce Development.

Any interested person may make written suggestions or comments on the proposed amendments prior to 4:30 p.m. on April 13, 1999. Such written material should be directed to Daniel Anderson, Chief Administrative Law Judge, Workforce Development Department, 1000 E. Grand Avenue, Des Moines, Iowa 50319. Comments may also be conveyed by telephone at (515)281-7082 or by fax to (515)242-5144.

These amendments are intended to implement Iowa Code section 96.6(1) and Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202.

The following amendments are proposed.

ITEM 1. Amend rules 871—26.3(17A,96), 26.8(17A,96), 26.11(17A,96), 26.12(17A,96), 26.13(17A,96), 26.15(17A,96), 26.16(17A,96) and 26.17(17A,96) by striking the term “administrative law judge” and inserting the term “presiding officer” wherever it appears.

ITEM 2. Amend rule 871—26.2 (17A,96) as follows:

**871—26.2(17A,96) Definitions.** Terms defined in the Iowa employment security law and the Iowa administrative procedure Act and which are used in these rules shall have the same meaning as provided by such laws. In addition, the following words and terms when used in this chapter shall have the following meanings, unless the context clearly indicates otherwise:

“Contested case” means a proceeding in which the legal rights, duties or privileges of a party are required by statute or constitution to be determined by the agency after an opportunity for an evidentiary hearing before an administrative law judge defined in Iowa Code section 17A.2(5) and includes any matter defined as a no factual dispute contested case in 1998 Iowa Acts, chapter 1202, section 14. It specifically includes any appeal from a determination of a representative of the department or any appeal or request for a hearing by an employer or employing unit from an experience rating, charge determination or other decision affecting its liability. Except as provided in subrule 26.17(5), a final decision of the employment appeal board of the department of inspections and appeals shall constitute final agency action. An administrative law judge’s *A presiding officer’s* decision shall be the final decision of the department if there is no appeal therefrom to the employment appeal board of the department of inspections and appeals.

“Parties in interest” means, to an unemployment benefits action, the individual claiming benefits (claimant), the agency and any employer named in the representative’s decision. The parties in interest to an action concerning employer contribution or reimbursement means the employer whose liability is affected by the action and the agency. The parties in interest to any other agency action affecting claims for benefits, other than regular unemployment, means any entity affected by the action and the agency or agencies involved.

“Party” means each person or agency named or admitted as a party or properly seeking and entitled as of right to be admitted as a party.

“Presiding officer” means an administrative law judge employed by the department of workforce development.

ITEM 3. Amend rule 871—26.4(17A,96) as follows:

**871—26.4(17A,96) Commencement of unemployment benefits contested case.**

26.4(1) An unemployment benefits contested case is commenced with the filing, by mail, *facsimile* or in person, of a written appeal by a party ~~in interest~~ with the appeals section of the department. The appeal shall be addressed or delivered to: Appeals Section, Department of Workforce Development, 1000 East Grand Avenue, Des Moines, Iowa 50319.

26.4(2) An appeal from an initial decision concerning the allowance or denial of benefits shall be filed, by mail, *facsimile* or in person, not later than ten calendar days, as determined by the postmark or the date stamp, after the decision was mailed to the party at its last-known address and shall state the following:

- a. The name, address and social security number of the claimant;
- b. A reference to the decision from which appeal is taken; and
- c. The grounds upon which the appeal is based.

26.4(3) Notwithstanding the provisions of subrule 26.4(2), a contributory employer, which has not previously received a notice of the filing of a valid claim for benefits, may appeal an individual’s eligibility to receive benefits within 30 days from the mailing date of the quarterly statement of benefit charges.

26.4(4) Also notwithstanding the provisions of subrule 26.4(2), a reimbursable employer, which has not previously received a notice of the filing of a valid claim for benefits, may appeal an individual’s eligibility to receive benefits within 15 days from the mailing date of the quarterly billing of benefit charges.

26.4(5) *Appeals transmitted by facsimile which are received by the appeals section after 11:59 p.m. Central time shall be deemed filed as of the next regular business day.*

ITEM 4. Amend rule 871—26.5(17A,96) as follows:

**871—26.5(17A,96) Commencement of employer liability contested case.**

26.5(1) An employer liability contested case is commenced with the filing of a written appeal with the appeals section of the department. The appeal shall be addressed or delivered to: Appeals Section, Department of Workforce Development, 1000 East Grand Avenue, Des Moines, Iowa 50319.

26.5(2) An appeal from a decision of the tax section of the department concerning employer status and liability, assessments, contribution (tax) rate, successorship, workers’ status, and all questions regarding coverage of a worker or group of workers shall be filed, by mail, *facsimile* or in person, not later than 30 calendar days, as determined by the postmark or the date stamp, after the decision was mailed to the party at its last-known address and shall set forth the following:

- a. The name, address, and Iowa employer account number of the employer;
- b. The name and title of the person filing the appeal;
- c. A reference to the decision from which the appeal is taken; and
- d. The grounds upon which the appeal is based.

26.5(3) *Appeals transmitted by facsimile which are received by the appeals section after 11:59 p.m. Central time shall be deemed filed as of the next regular business day.*

ITEM 5. Amend rule 871—26.6(17A,96) as follows:

**871—26.6(17A,96) Notice of hearing.**

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**26.6(1)** A telephone or in-person hearing shall not be scheduled before the seventh calendar day after the parties receive notice of the hearing. Notice of hearing shall be sent by first-class mail to all parties ~~in interest~~ at their last-known address and shall include:

a. The date, time and place of an in-person hearing, or the date and time of a telephone hearing, including instructions for calling the appeals section in advance of the hearing to provide the names and telephone numbers of all witnesses; and

b. The nature of the hearing, including the legal authority and jurisdiction under which the hearing is held; and

c. A statement of the issues and the applicable sections of the Iowa Code or Iowa Administrative Code; and

d. *A description of who will serve as presiding officer.*

**26.6(2)** The seven-day notice of hearing may be waived upon the agreement of the parties. ~~in interest.~~

**26.6(3)** An in-person hearing shall be scheduled in the following workforce development centers: Burlington, Carroll, Cedar Rapids, Creston, Council Bluffs, Davenport, Decorah, Des Moines, Dubuque, Fort Dodge, Mason City, Ottumwa, Sioux City, Spencer, Storm Lake, and Waterloo.

**26.6(4)** A hearing shall be scheduled promptly and shall be conducted by telephone unless a party ~~in interest~~ requests that it be held in person. A request for an in-person hearing may be denied if factors such as the distance between the parties, the number of parties or the health of any party makes it impractical or impossible to conduct a fair hearing in person. An in-person hearing may be scheduled at the discretion of the ~~administrative law judge presiding officer~~ to whom the contested case is assigned or, in that ~~administrative law judge's presiding officer's~~ absence, the chief administrative law judge of the appeals section. The party requesting an in-person hearing will ordinarily be required to travel the greater distance if all parties are not located near the same hearing site. As a matter of discretion, the appeals section may schedule an in-person hearing at a regular hearing site approximately equidistant from the parties. In the discretion of the ~~administrative law judge presiding officer~~ to whom the contested case is assigned, witnesses or representatives may be allowed to participate via telephone in an in-person hearing, provided that each party has at least one witness present at the hearing site. When two or more parties are involved, the evidence shall be presented during the same hearing.

**26.6(5)** Whenever it appears that other parties should be joined to dispose of all issues in a contested case, the ~~administrative law judge presiding officer~~ shall so order and shall grant such continuance and hold such additional proceedings, upon notice to all parties, as may be necessary.

**26.6(6)** Any number of appeals involving similar issues of law or fact may be consolidated for hearing so long as no substantial rights of any party would be prejudiced by so doing.

**26.6(7)** Any party may appear in any proceeding. Any partnership, corporation, or association may be represented by any of its members, officers, or a duly authorized representative. Any party may appear by, or be represented by, an attorney-at-law or a duly authorized representative of an interested party.

**26.6(8)** Where a party not attending the hearing will be represented by another person, such person shall submit written proof of such representation, signed by the party such person purports to represent, at least three days before the hearing to the ~~administrative law judge presiding officer.~~

ITEM 6. Amend rule 871—26.7(17A,96) as follows:

**871—26.7(17A,96) Recusal.**

**26.7(1)** ~~An administrative law judge~~ *A presiding officer* shall withdraw from participation in the hearing or the making of any decision in a contested case if:

a. ~~The administrative law judge presiding officer~~ has a personal bias or prejudice concerning a party or a representative of a party;

b. ~~The administrative law judge presiding officer~~ has personally *investigated*, prosecuted or advocated, in connection with that case, the specific controversy underlying the case, or another pending factually related case or pending factually related controversy that may culminate in a contested case involving the same parties;

c. ~~The administrative law judge presiding officer~~ is subject to the authority, direction or discretion of any person who has personally *investigated*, prosecuted or advocated in connection with that contested case, the specific controversy underlying the contested case, or a pending factually related contested case or controversy involving the same parties;

~~d. The administrative law judge has personally investigated the pending contested case by taking affirmative steps to interview witnesses directly or to obtain documents directly. The term "personally investigated" does not include either direction and supervision of assigned investigators or unsolicited receipt of oral information or documents which are relayed to assigned investigators;~~

~~e d.~~ *The administrative law judge presiding officer* has acted as counsel to any person who is a private party to that proceeding within the past two years;

~~f e.~~ *The administrative law judge presiding officer* has a personal financial interest in the outcome of the case or any other significant personal interest that could be substantially affected by the outcome of the case;

~~g f.~~ *The administrative law judge presiding officer* has a spouse or relative within the third degree of relationship that: is a party to the case, or an officer, director or trustee of a party; is a lawyer in the case; is known to have an interest that could be substantially affected by the outcome of the case; or is likely to be a material witness in the case; or

~~h g.~~ *The administrative law judge presiding officer* has any other legally sufficient cause to withdraw from participation in the hearing and decision making in that case.

**26.7(2)** *The term "personally investigated" means taking affirmative steps to interview witnesses directly or to obtain documents or other information directly. The term "personally investigated" does not include general direction and supervision of assigned investigators, unsolicited receipt of information which is relayed to assigned investigators, review of another person's investigative work product in the course of determining whether there is probable cause to initiate a proceeding, or exposure to factual information while performing other agency functions, including fact gathering for purposes other than investigation of the matter which culminates in a contested case. Factual information relevant to the merits of a contested case received by a person who later serves as presiding officer in that case shall be disclosed if required by Iowa Code section 17A.17 as amended by 1998 Iowa Acts, chapter 1202, section 19, and subrule 26.10(7).*

**26.7(2 3)** If the ~~administrative law judge presiding officer~~ knows of information which might reasonably be deemed a basis for recusal but decides recusal is unnecessary, the ~~administrative law judge presiding officer~~ shall submit the relevant information for the record along with a statement of the reasons for declining recusal.

**26.7(3 4)** If a party asserts disqualification of the ~~administrative law judge presiding officer~~ for any appropriate

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ground, the party shall file an affidavit pursuant to Iowa Code section 17A.17(4) *as amended by 1998 Iowa Acts, chapter 1202, section 19*, as soon as the reason alleged in the affidavit becomes known to the party. If, during the course of a hearing, a party first becomes aware of evidence of bias or other ground for recusal, the party may move for recusal but must establish the grounds by the introduction of evidence into the record. If the ~~administrative law judge presiding officer~~ determines that recusal is appropriate, the ~~administrative law judge presiding officer~~ shall withdraw. If the ~~administrative law judge presiding officer~~ decides that recusal is not required, the ~~administrative law judge presiding officer~~ shall enter an order to that effect. This order may be the basis of the aggrieved party's appeal from the ~~administrative law judge's presiding officer's~~ decision in the case.

ITEM 7. Amend rule 871—26.9(17A,96) as follows:

**871—26.9(17A,96) Discovery.**

**26.9(1)** Discovery procedures applicable to civil actions are available to all parties in interest in contested cases.

**26.9(2)** Unless otherwise limited by a protective order, the frequency of use of discovery methods is not limited. Upon application by any adversely affected party or upon the ~~administrative law judge's presiding officer's~~ own motion, the ~~administrative law judge presiding officer~~ may order otherwise in the following situations:

a. The discovery sought is unduly repetitious, or the information sought may be obtained in another method that is more convenient, less burdensome or less expensive; or

b. The party seeking discovery has had prior ample opportunity to obtain the information; or

c. The discovery is unduly burdensome or expensive when viewed in the context of the factual issues to be resolved, the limited resources of the parties, and the parties' interest in prompt resolution of the contested case.

**26.9(3)** A party may obtain discovery regarding any matter, not privileged, relevant to the subject matter involved in the contested case, including the existence, description, nature, custody, condition and location of any tangible items and the identity and location of persons having knowledge of discoverable matters. Information may be discovered, even if inadmissible itself, if it appears reasonably calculated to lead to the discovery of admissible evidence. In any event, the names of a party's witnesses, their expected testimony, and exhibits to be offered into evidence may be obtained by discovery.

**26.9(4)** A party who has responded to a request for discovery with a response which was complete and accurate when made need not supplement the response to include information obtained after the response. However, a party must promptly supplement its response to requests for the identity and location of persons having knowledge of discoverable matters, the identity of each person expected to be called to testify at the hearing, and the party must produce copies of exhibits expected to be offered into evidence at the hearing as such decisions are made. A party must also promptly amend any response if it obtains information establishing that its prior response was incorrect when made or, though correct when made, is no longer correct.

**26.9(5)** No motion relating to discovery, including motions for imposition of sanctions, will be considered unless the moving party alleges that it has made a good faith but unsuccessful effort to resolve the issues raised in the motion with the opposing party without intervention by the ~~administrative law judge presiding officer~~.

**26.9(6)** Upon motion by a party or the person from whom discovery is sought or by any person who may be adversely affected thereby, and for good cause shown, the ~~administrative law judge presiding officer~~ before whom the contested case is pending may make any order which justice requires to protect a party or person from oppression or undue burden of expense. Such order may deny the request for discovery or limit terms, conditions, manner and scope thereof.

**26.9(7)** A party may, in accordance with subrule 26.9(5), apply to the ~~administrative law judge presiding officer~~ before whom a contested case is pending for an order compelling discovery if the party upon whom the request has been served fails within a reasonable time to make a complete, good faith response. After notice to both parties and hearing upon the motion, the ~~administrative law judge presiding officer~~ shall enter an order which denies or compels discovery, which order may be combined with a protective order pursuant to subrule 26.9(6).

**26.9(8)** Upon application by any party or upon the ~~administrative law judge's presiding officer's~~ own motion, the ~~administrative law judge presiding officer~~ may impose sanctions for the failure to make discovery; however, sanctions shall not be imposed without prior specific notice from the ~~administrative law judge presiding officer~~ of the contemplated sanction, opportunity to be heard, and, if necessary, further opportunity to cure its failure. The sanctions may include the following:

a. The granting of a postponement to a party demonstrably prejudiced by the failure;

b. The exclusion of the testimony of witnesses not identified in response to a specific request for such information;

c. The exclusion from the record of those exhibits not identified in response to a specific request for such information;

d. The exclusion of the party from participation in the contested case proceedings;

e. The dismissal of the party's appeal.

**26.9(9)** Requests for discovery ~~and responses thereto~~ shall be filed with the Appeals Section, Department of Workforce Development, 1000 East Grand Avenue, Des Moines, Iowa 50319, for service on other parties and persons. Responses must be filed *with the party requesting the discovery* within ten days after mailing by the department unless an extension of time in which to comply has been granted by the ~~administrative law judge presiding officer~~. Requests for discovery received within five days before a scheduled contested case hearing will not be honored in the absence of a request for a postponement showing good cause therefor. A party's inattention to preparation is not good cause for postponement.

ITEM 8. Amend rule 871—26.10(17A,96) as follows:

**871—26.10(17A,96) Ex parte communications.**

**26.10(1)** An ex parte communication is an oral or written communication relating directly to the facts or legal questions at issue in a contested case proceeding which is made by a party ~~in interest~~ to the ~~administrative law judge presiding officer~~ to whom the case has been assigned without the knowledge or outside the presence of the other parties and with the object of affecting the outcome of the case.

**26.10(2)** Ex parte communication does not include:

a. Statements given by the parties to representatives of the department for use in making the initial determination;

b. Statements contained in a party's appeal from the initial determination;

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c. Statements relating only to procedural or scheduling matters, such as requests for discovery, subpoenas, postponements or withdrawals of appeals;

d. Requests for clarification of a legal issue involved in a contested case, but only to the extent of requesting information on the applicable law sections and not as to matters of fact.

**26.10(3)** Unless required for the disposition of ex parte matters specifically authorized by statute or rule, no party or its representative shall communicate directly or indirectly with the ~~administrative law judge~~ *presiding officer* to whom a contested case is assigned, nor shall the ~~administrative law judge~~ *presiding officer* communicate directly or indirectly with a party or its representative concerning any issue of fact or law in a contested case unless:

a. Each party or its representative is given written notification of the communication. Such notification shall contain a summary of the communication, if oral, or a copy of the communication, if written, as well as the time, place and means of the communication.

b. After notification, all parties have the right, upon written demand, to respond to the ex parte communication, including the right to be present and heard if an oral communication has not been completed. If the communication is written, or if oral and completed, all other parties have the right, upon written demand, to a special hearing to respond to the ex parte communication.

c. Whether or not any party requests the opportunity to respond to an ex parte communication made in violation of Iowa Code section 17A.17(2) as amended by 1998 Iowa Acts, chapter 1202, section 19, the ~~administrative law judge~~ *presiding officer* shall include such communication in the official record of the contested case.

**26.10(4)** *Prohibitions on ex parte communications commence with the issuance of the notice of hearing in a contested case and continue for as long as the case is pending.*

**26.10(5)** *Communications with the presiding officer involving uncontested scheduling or procedural matters do not require notice or opportunity for parties to participate. Parties should notify other parties prior to initiating such contact with the presiding officer when feasible.*

**26.10(6)** *A presiding officer who receives a prohibited ex parte communication during the pendency of a contested case must initially determine if the effect of the communication is so prejudicial as to require the presiding officer's recusal. If the presiding officer determines that recusal is warranted, a copy of any prohibited written communication, all written responses to the communication, a written summary stating the substance of any prohibited oral or other communication not available in written form for disclosure, all responses made, and the identity of each person from whom the presiding officer received a prohibited ex parte communication shall be submitted for inclusion in the record under seal by protective order or disclosed. If the presiding officer determines that recusal is not warranted, such documents shall be submitted for inclusion in the record and served on all parties. Any party desiring to rebut the prohibited communication must be allowed the opportunity to do so upon written request filed within ten days after notice of the communication.*

**26.10(7)** *Promptly after being assigned to serve as presiding officer at any stage in a contested case proceeding, a presiding officer shall disclose to all parties material factual information received through ex parte communication prior to such assignment unless the factual material has already been or shortly will be disclosed. Factual information con-*

*tained in an investigative report or similar document need not be separately disclosed by the presiding officer as long as such documents have been or shortly will be provided to the parties.*

**26.10(8)** *The presiding officer may impose appropriate sanctions for violations of this rule, including dismissal of an appellant's contested case, a decision against the offending party, censure, or suspension or revocation of the privilege to practice before the agency. Violation of ex parte communication prohibitions by agency personnel shall be reported to the chief administrative law judge for possible sanctions.*

ITEM 9. Amend rule 871—26.14(17A,96) as follows:

**871—26.14(17A,96) Conduct of hearings.**

**26.14(1)** Each contested case hearing shall be held and decided by an ~~administrative law judge~~ *presiding officer who is an administrative law judge employed by the department of workforce development. Good cause for retention of these hearings exists to allow parties to unemployment insurance contested cases to resolve all issues in one consolidated hearing. The qualifications for administrative law judges employed by the department of workforce development shall be the same as the qualifications for administrative law judges employed by the division of administrative hearings of the department of inspections and appeals. Administrative law judge decisions in unemployment insurance contested cases are not subject to review by the director of the department of workforce development.*

a. *For other identified good cause, a hearing may be held and decided by an administrative law judge assigned by the department of inspections and appeals.*

b. *Requests for reassignment as provided in paragraph "a" of this subrule must be made not less than seven calendar days prior to a hearing.*

**26.14(2)** The ~~administrative law judge~~ *presiding officer* shall inquire fully into the factual matters at issue and shall receive in evidence the sworn testimony of witnesses and physical evidence which are material and relevant to such matters. Upon the ~~administrative law judge's~~ *presiding officer's* own motion or upon the written application of any party, and for good cause shown, the ~~administrative law judge~~ *presiding officer* may reopen the record for additional material, relevant and nonrepetitious evidence not submitted at the original contested case hearing.

**26.14(3)** The ~~administrative law judge~~ *presiding officer* shall begin each hearing with a brief statement identifying the parties and issues, outlining the history of the case, advising the parties of their appeal rights and announcing what matters, if any, will be officially noticed. Any party may inspect and use any portion of the administrative file necessary for the presentation of its case. The administrative file may include information from the claimant's files maintained in the agency's computer system.

**26.14(4)** The hearing shall be confined to evidence relevant to the issue or issues stated on the notice of hearing. If, during the course of a hearing, it appears to the ~~administrative law judge~~ *presiding officer* that a section of the Iowa Code not set forth in the notice of hearing may affect the ~~administrative law judge's~~ *presiding officer's* decision, the ~~administrative law judge~~ *presiding officer* shall so notify the parties and announce willingness to continue taking testimony on the underlying factual matters if the parties agree to waive on record further notice and make no objection to continuing. If any party objects, the ~~administrative law judge~~ *presiding officer* shall postpone the hearing and cause new notices of hearing, containing all relevant issues and law sec-

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tions, to be sent to the parties. Notwithstanding, voluntary quits and discharges generally shall be construed to constitute the single issue of separation from employment so that evidence of either or both types of separation may be received in a single hearing.

**26.14(5)** If factual issues generally relevant to a party's eligibility or liability for benefits but unrelated to the underlying facts in controversy in the present contested case are exposed, the ~~administrative law judge presiding officer~~ shall not take testimony or evidence on such issue but shall remand the issue to the appropriate section of the department for investigation and preliminary determination.

**26.14(6)** In the event that one or more parties which have received notice for a contested case hearing fail to appear at the time and place of an in-person hearing, the ~~administrative law judge presiding officer~~ may proceed with the hearing.

a. If an absent party arrives for an in-person hearing while the hearing is in session, the ~~administrative law judge presiding officer~~ shall pause to admit the party, summarize the hearing to that point, administer the oath and resume the hearing.

b. If an absent party arrives for an in-person hearing after the record has been closed and after any party which had participated in the hearing has departed, the ~~administrative law judge presiding officer~~ shall not take the evidence of the late party. Instead, the ~~administrative law judge presiding officer~~ shall inquire ex parte as to the reason the party was late. For good cause shown, the ~~administrative law judge presiding officer~~ shall cause notice of hearing to be issued to all parties of record and reopen the record. The record shall not be reopened if the ~~administrative law judge presiding officer~~ does not find a good cause for the party's late arrival.

**26.14(7)** If a party has not responded to a notice of telephone hearing by providing the appeals section with the names and telephone numbers of its witnesses by the scheduled time of the hearing, the ~~administrative law judge presiding officer~~ may proceed with the hearing.

a. If an absent party responds to the hearing notice while the hearing is in progress, the ~~administrative law judge presiding officer~~ shall pause to admit the party, summarize the hearing to that point, administer the oath, and resume the hearing.

b. If a party responds to the notice of hearing after the record has been closed and any party which has participated is no longer on the telephone line, the ~~administrative law judge presiding officer~~ shall not take the evidence of the late party. Instead, the ~~administrative law judge presiding officer~~ shall inquire as to why the party was late in responding to the notice of hearing. For good cause shown, the ~~administrative law judge presiding officer~~ shall reopen the record and cause further notice of hearing to be issued to all parties of record. The record shall not be reopened if the ~~administrative law judge presiding officer~~ does not find good cause for the party's late response to the notice of hearing.

c. Failure to read or follow the instructions on the notice of hearing shall not constitute good cause for reopening the record.

**26.14(8)** The ~~administrative law judge presiding officer~~ shall record all communications with late parties. If the ~~administrative law judge presiding officer~~ does not reopen the record, the decision in the contested case shall state the ~~administrative law judge's presiding officer's~~ reason for so doing.

**26.14(9)** If the late party fails once again to participate in the rescheduled hearing, there shall be no further postponements. Nevertheless, a party's failure to participate in a con-

tested case hearing shall not result in a decision automatically being entered against it.

**26.14(10)** Whenever necessary, the ~~administrative law judge presiding officer~~ may require the attendance at a hearing of department employees having knowledge of the facts in controversy or having technical knowledge concerning the issues raised in appeal.

a. If the primary issue is the claimant's ability to work, availability for work or work search, the department shall be named as respondent. The ~~administrative law judge presiding officer~~ may call department personnel having knowledge of the facts in controversy as witnesses.

b. If the issue on appeal is an offer of or recall to work or a job referral by a local workforce development center, both the employer making the offer or recall and the workforce development center representative making the referral may be witnesses at the hearing.

c. If the issue on appeal is the claimant's refusal of employment because of wages, the ~~administrative law judge presiding officer~~ may take the testimony of the workforce development representative having knowledge of prevailing wages in the vicinity. The ~~administrative law judge presiding officer~~ may also obtain testimony and evidence of the hours and other conditions of work for similar jobs in the area.

**26.14(11)** In the discretion of the ~~administrative law judge presiding officer~~, witnesses may be excluded from the hearing room until called to testify. The ~~administrative law judge presiding officer~~ shall admonish such witnesses not to discuss the case among themselves until after the record has been closed. All witnesses shall be subject to examination by the ~~administrative law judge presiding officer~~ and by all parties.

**26.14(12)** The ~~administrative law judge presiding officer~~ may expel or refuse admittance to any party, witness or other person whose conduct at the hearing is disorderly.

**26.14(13)** *If the parties agree that no dispute of material facts exists as to a matter that would be a contested case if such a dispute of fact existed, the parties may present all relevant material evidence either by stipulation or otherwise as agreed by the parties, without the necessity of a formal evidentiary hearing.*

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## WORKFORCE DEVELOPMENT DEPARTMENT[871]

### Notice of Intended Action

Twenty-five interested persons, a governmental subdivision, an agency or association of 25 or more persons may demand an oral presentation hereon as provided in Iowa Code section 17A.4(1)"b."

Notice is also given to the public that the Administrative Rules Review Committee may, on its own motion or on written request by any individual or group, review this proposed action under section 17A.8(6) at a regular or special meeting where the public or interested persons may be heard.

Pursuant to the authority of Iowa Code section 96.11, the Interim Director of the Workforce Development Department hereby gives Notice of Intended Action to amend Chapter 43, "Petitions for Rule Making," and Chapter 44, "Declaratory Rulings," Iowa Administrative Code.

These proposed amendments are intended to implement 1998 Iowa Acts, chapter 1202, relating to revisions of the Iowa Administrative Procedure Act.

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Interested persons, governmental agencies and associations may present written comments or statements on the proposed amendments not later than 4:30 p.m., April 13, 1999, to Reynel Dohse, Department of Workforce Development, Unemployment Insurance Services Division, 1000 E. Grand Avenue, Des Moines, Iowa 50319.

A public hearing will be held at 9:30 a.m., April 13, 1999, at the above address. The proposed amendments are subject to revision after the Division considers all written and oral presentations. Persons who want to convey their views orally should contact Reynel Dohse at (515) 281-4986 or at the above address.

These amendments are intended to implement Iowa Code sections 17A.7, 17A.9, 84A.1, 96.4(6)"a," 96.5(1), 96.6(2), 96.7(8), 96.10, 96.12, and 96.14 and Federal VCX Law (5 U.S.C. 8525) and 1998 Iowa Acts, chapter 1202.

The following amendments are proposed.

ITEM 1. Amend 871—Chapter 43 by adopting a new rule as follows:

**871—43.5(17A) Criticism of agency rule.** The Division Administrator of the Division of Unemployment Insurance Services, Department of Workforce Development, 1000 East Grand Avenue, Des Moines, Iowa 50319, is designated as the office where interested persons may submit criticism by mail regarding a rule of the workforce development department, Iowa Administrative Code. A criticism of a specific rule must be more than a mere lack of understanding or a dislike of a rule. To constitute a criticism of a rule, the criticism must be in writing, indicate it is a criticism of a specific rule, be signed by the complainant, not be part of any other filing with the department of workforce development, and have a national basis. All requests for criticism received on any rule will be kept in a separate record for a period of five years by the decision of unemployment insurance services and be a public record open for public inspection. All requests for criticism must be in the following format:

DEPARTMENT OF WORKFORCE DEVELOPMENT  
DIVISION OF UNEMPLOYMENT INSURANCE  
SERVICES

(NAME OF PERSON SUBMITTING CRITICISM). } CRITICISM OF (SPECIFY RULE THAT IS UNDER CRITICISM).

Name, address, telephone number and signature of person submitting the criticism.  
Reasons for criticism:

ITEM 2. Amend 871—Chapter 44 as follows:  
Amend the chapter title as follows:

**DECLARATORY RULINGS ORDERS**

Amend rule 871—44.1(17A,84A) as follows:

**871—44.1(17A,84A) Petition for declaratory ruling order.** Any person may file a petition with the agency for a declaratory ruling concerning the applicability of any statute, rule, policy, decision, or order, administered by the agency, order as to the applicability to specified circumstances of a statute, rule, or order within the primary jurisdiction of the department of workforce development, at its offices at 1000 East Grand Avenue, Des Moines, Iowa 50319. If the petition deals with a statute within the express jurisdiction of one of the divisions, it shall be forwarded to that division for deter-

mination. Service of petitions for district court review of all agency decisions, rulings and actions (where such service is required by Iowa Code chapter 17A) shall be made by the agency. ~~General counsel will represent the agency in all litigations relating to the agency.~~ Declaratory rulings orders made by the divisions will be considered final rulings for the agency with regard to Iowa Code chapter 17A.

A petition is deemed filed when it is received by that office. The agency ~~must~~ shall provide the petitioner with a file-stamped copy of the petition if the petitioner provides the agency an extra copy for this purpose. The petition must be typewritten or legibly handwritten in ink and must substantially conform to the following form:

DEPARTMENT OF WORKFORCE DEVELOPMENT

Petition by (Name of Petitioner) for a Declaratory Ruling Order on (Cite provisions of law involved). } PETITION FOR DECLARATORY RULING ORDER

The petition must provide the following information:

- 1. A clear and concise statement of all relevant facts on which the ruling order is requested.
  - 2. A citation and the relevant language of the specific statutes, rules, policies, decisions, or orders, whose applicability is questioned, and any other relevant law.
  - 3. The questions petitioner wants answered, stated clearly and concisely.
  - 4. The answers to the questions desired by the petitioner and a summary of the reasons urged by the petitioner in support of those answers.
  - 5. The reasons for requesting the declaratory ruling order and disclosure of the petitioner's interest in the outcome.
  - 6. A statement indicating whether the petitioner is currently a party to another proceeding involving the questions at issue and whether, to the petitioner's knowledge, those questions have been decided by, are pending determination by, or are under investigation by any governmental entity.
  - 7. The names and addresses of other persons, or a description of any class of persons, known by petitioner to be affected by, or interested in, the questions presented in the petition.
  - 8. Any request by petitioner for a meeting provided for by rule 44.4(17A,84A).
- The petition must be dated and signed by the petitioner or the petitioner's representative. It must also include the name, mailing address, and telephone number of the petitioner and petitioner's representative, and a statement indicating the person to whom communications concerning the petition should be directed.

Rescind rule 871—44.2 (17A,84A) and adopt the following new rule in lieu thereof:

**871—44.2(17A) Notice of petition.** Within 15 days after receipt of a petition for a declaratory order, the agency shall give notice of the petition to all persons not served by the petitioner pursuant to 44.6(17A) to whom notice is required by any provision of law. The agency may also give notice to any other persons.

Rescind rule 871—44.3(17A,84A) and adopt the following new rule in lieu thereof:

**871—44.3(17A) Intervention.**

**44.3(1)** Persons who qualify under any applicable provision of law as an intervenor and who file a petition for intervention within 20 days of the filing of a petition for declara-

## WORKFORCE DEVELOPMENT DEPARTMENT[871](cont'd)

tory order shall be allowed to intervene in a proceeding for a declaratory order.

**44.3(2)** Any person who files a petition for intervention at any time prior to the issuance of an order may be allowed to intervene in a proceeding for a declaratory order at the discretion of the department of workforce development.

**44.3(3)** A petition for intervention shall be filed at 1000 East Grand Avenue, Des Moines, Iowa 50319. Such a petition is deemed filed when it is received by that office. The agency will provide the petitioner with a file-stamped copy of the petition for intervention if the petitioner provides an extra copy for this purpose. A petition for intervention must be typewritten or legibly handwritten in ink and must substantially conform to the following form:

## DEPARTMENT OF WORKFORCE DEVELOPMENT

Petition by (Name of Original Petitioner) for a Declaratory Order on (Cite provisions of law cited in original petition).	}	PETITION FOR INTERVENTION
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The petition for intervention must provide the following information:

1. Facts supporting the intervenor's standing and qualifications for intervention.
2. The answers urged by the intervenor to the question or questions presented and a summary of the reasons urged in support of those answers.
3. Reasons for requesting intervention and disclosure of the intervenor's interest in the outcome.
4. A statement indicating whether the intervenor is currently a party to any proceeding involving the questions at issue and whether, to the intervenor's knowledge, those questions have been decided by, are pending determination by, or are under investigation by, any governmental entity.
5. The names and addresses of any additional persons, or a description of any additional class of persons, known by the intervenor to be affected by, or interested in, the questions presented.
6. Whether the intervenor consents to be bound by the determination of the matters presented in the declaratory order proceeding.

The petition must be dated and signed by the intervenor or the intervenor's representative. It must also include the name, mailing address, and telephone number of the intervenor and intervenor's representative, and a statement indicating the person to whom communications should be directed.

Renumber rule **871—44.2(17A,84A)** as **871—44.4(17A)** and amend as follows:

**871—44.2 4(17A,84A) Briefs.** The petitioner or any intervenor may attach file a brief to the petition in support of the position urged in the petition. The agency department of workforce development may request a brief from the petitioner, any intervenor, or from any other person concerning the questions raised in the petition.

Renumber rule **871—44.3(17A,84A)** as **871—44.5(17A)** and amend as follows:

**871—44.3 5(17A,84A) Inquiries.** Inquiries concerning the status of a petition for a declaratory ruling order proceeding may be made to the director of the Department of Workforce Development, 1000 East Grand Avenue, Des Moines, Iowa 50319.

Rescind rule **871—44.6(17A,84A)** and adopt the following **new** rule in lieu thereof:

**871—44.6(17A) Service and filing of petitions and other papers.**

**44.6(1)** When service required. Except where otherwise provided by law, every petition for declaratory order, petition for intervention, brief, or other paper filed in a proceeding for a declaratory order shall be served upon each of the parties of record to the proceeding and on all other persons identified in the petition for declaratory order or petition for intervention as affected by or interested in the questions presented, simultaneously with their filing. The party filing a document is responsible for service on all parties and other affected or interested persons.

**44.6(2)** Filing—when required. All petitions for declaratory orders, petitions for intervention, briefs, or other papers in a proceeding for a declaratory order shall be filed with the director of the Department of Workforce Development, 1000 East Grand Avenue, Des Moines, Iowa 50319. All petitions, briefs, or other papers that are required to be served upon a party shall be filed simultaneously with the department of workforce development.

**44.6(3)** Method of service, time of filing, and proof of mailing. Method of service, time of filing, and proof of mailing shall be as provided by rule **871—26.11(17A,96)**.

Renumber rule **871—44.4(17A,84A)** as **871—44.7(17A)** and amend as follows:

**871—44.4 7(17A,84A) Agency consideration Consideration.** Upon request by petitioner, in the petition, the agency department of workforce development must schedule a brief and informal meeting between the original petitioner, all intervenors and the agency, a member of the agency, or a member of the staff of the agency department of workforce development, to discuss the petition questions raised. The agency may request the petitioner to submit additional information or argument concerning the petition. The agency may solicit comments from any person on the questions presented in the petition raised. Also, comments on those the questions raised may be submitted to the agency department of workforce development by any person.

Within 30 days after the filing of the petition, or within any longer period agreed to by the petitioner, the agency must, in writing, issue a ruling on the petition or refuse to do so. An agency is deemed to have issued a ruling or to have refused to do so on the date the ruling or refusal is mailed or delivered to petitioner.

Adopt the following **new** rule:

**871—44.8(17A) Action on petition.**

**44.8(1)** Within the time allowed by Iowa Code section 17A.9(5) after receipt of a petition or a declaratory order, the director of the department of workforce development or designee shall take action on the petition as required by Iowa Code section 17A.9(5).

**44.8(2)** The date of issuance of an order or of a refusal to issue an order is as defined in rule **877—26.2(17A,96)**.

Renumber rule **871—44.5(17A,84A)** as **871—44.9(17A)** and amend as follows:

**871—44.5 9(17A,84A) Refusal to issue ruling order.**

**44.9(1)** The agency department of workforce development shall not issue a declaratory order where prohibited by Iowa Code section 17A.9(1) and may refuse to issue a declaratory ruling for good cause. Good cause includes, but is not limited to, order on some or all questions raised for the following reasons:

## WORKFORCE DEVELOPMENT DEPARTMENT[871](cont'd)

1. The petition does not substantially comply with the required form.

2. The petition does not contain facts sufficient to demonstrate that the petitioner will be aggrieved or adversely affected by the failure of the *department of workforce development* to issue a ~~ruling~~ *an order*.

3. The agency does not have jurisdiction over the questions presented in the petition.

4. The questions presented by the petition are also presented in a current rule making, contested case, or other agency or judicial proceeding that may definitively resolve them.

5. The questions presented by the petition would more properly be resolved in a different type of proceeding or by another body with jurisdiction over the matter.

6. The facts or questions presented in the petition are unclear, overbroad, insufficient, or otherwise inappropriate as a basis upon which to issue a ~~ruling~~ *an order*.

7. There is no need to issue a ~~ruling~~ *an order* because the questions raised in the petition have been settled due to a change in circumstances.

8. The petition is not based upon facts calculated to aid in the planning of future conduct but is, instead, based solely upon prior conduct in an effort to establish the effect of that conduct or to challenge an agency decision already made.

9. The petition requests a declaratory ~~ruling~~ *order* that would necessarily determine the legal rights, duties, or responsibilities of other persons who have not joined in the petition, *intervened separately*, or filed a similar petition and whose position on the questions presented may fairly be presumed to be adverse to that petitioner.

10. The petitioner requests the agency to determine whether a statute is unconstitutional on its face.

~~44.5(1)~~ ~~44.9(2)~~ A refusal to issue a declaratory ~~ruling~~ *order* must indicate the specific grounds for the refusal and constitutes final agency action on the petition.

~~44.5(2)~~ ~~44.9(3)~~ Refusal to issue a declaratory ~~ruling~~ *order* pursuant to this provision does not preclude the filing of a new petition that seeks to eliminate the grounds for the ~~agency's~~ refusal to issue a ruling.

Renumber ~~871—44.6(17A,84A)~~ as ~~871—44.10(17A)~~ and amend as follows:

~~871—44.6 10(17A,84A)~~ **Contents of declaratory ~~ruling~~ *order—effective date.*** In addition to the ruling itself, a declaratory ~~ruling~~ *order* must contain the date of its issuance, the name of petitioner *and all intervenors*, the specific statutes, rules, policies, decisions, or orders involved, the particular facts upon which it is based, and the reasons for its conclusion.

A declaratory ~~ruling~~ *order* is effective on the date of issuance.

Adopt the following new rule:

~~871—44.11(17A)~~ **Copies of orders.** A copy of all orders issued in response to a petition for a declaratory order shall be mailed promptly to the original petitioner and all intervenors.

Renumber rule ~~871—44.7(17A,84A)~~ as ~~871—44.12(17A)~~ and amend as follows:

~~871—44.7 12(17A,84A)~~ **Effect of a declaratory ~~ruling~~ *order.*** A declaratory ~~ruling~~ *order* has the same status and binding effect as a final order issued in a contested case proceeding. It is binding on the ~~agency~~ *department of workforce development*, ~~and the petitioner, and any intervenors who consent to be bound~~ and is applicable only in circumstances where the relevant facts and the law involved are indistinguishable from those ~~contained in the petition on which the order was based.~~ As to all other persons, a declaratory ruling serves only as precedent and is not binding on the ~~agency~~ *department of workforce development*. The issuance of a declaratory ~~ruling~~ *order* constitutes final agency action on the petition.

**ARC 8846A****LABOR SERVICES DIVISION[875]****Adopted and Filed Emergency After Notice**

Pursuant to the authority of Iowa Code sections 88.5, 17A.3(1) and 17A.5(2), the Labor Commissioner adopts an amendment to Chapter 10, "General Industry Safety and Health Rules," Iowa Administrative Code.

The amendment relates to permit-required confined spaces and powered industrial truck operator training.

Notice of Intended Action was published in the Iowa Administrative Bulletin on January 27, 1999, as **ARC 8634A**.

In compliance with Iowa Code section 88.5(1)"b," a public hearing was scheduled for February 18, 1999. No comments were received. This amendment is identical to the Notice of Intended Action.

Pursuant to Iowa Code section 17A.5(2)"b"(2) and (3), this amendment shall become effective upon publication on March 24, 1999. The Commissioner finds that this amendment confers a benefit on employees by permitting them to be provided with safety and health equal those found in states under federal OSHA's jurisdiction and is necessary because of the safety and health of employees in this state.

This amendment is intended to implement Iowa Code section 88.5.

The amendment will become effective March 24, 1999.

The following amendment is adopted.

Amend rule **875—10.20(88)** by inserting at the end thereof:

63 Fed. Reg. 66038 (December 1, 1998)

63 Fed. Reg. 66270 (December 1, 1998)

[Filed Emergency After Notice 3/5/99, effective 3/24/99]

[Published 3/24/99]

EDITOR'S NOTE: For replacement pages for IAC, see IAC Supplement 3/24/99.

**ARC 8845A****LABOR SERVICES DIVISION[875]****Adopted and Filed Emergency After Notice**

Pursuant to the authority of Iowa Code sections 88.5 and 17A.3(1), the Labor Commissioner adopts an amendment to Chapter 26, "Construction Safety and Health Rules," Iowa Administrative Code.

The amendment relates to powered industrial truck operator training.

Notice of Intended Action was published in the Iowa Administrative Bulletin on January 27, 1999, as **ARC 8637A**.

In compliance with Iowa Code section 88.5(1)"b," a public hearing was scheduled for February 18, 1999. No comments were received. This amendment is identical to the Notice of Intended Action.

Pursuant to Iowa Code section 17A.5(2)"b"(2) and (3), this amendment shall become effective upon publication on March 24, 1999. The Commissioner finds that this amendment confers a benefit on employees by permitting them to be provided with safety and health equal those found in states under federal OSHA's jurisdiction and is necessary because of the safety and health of employees in this state.

This amendment is intended to implement Iowa Code section 88.5.

The amendment will become effective March 24, 1999. The following amendment is adopted.

Amend rule **875—26.1(88)** by inserting at the end thereof:

63 Fed. Reg. 66274 (December 1, 1998)

[Filed Emergency After Notice 3/5/99, effective 3/24/99]

[Published 3/24/99]

EDITOR'S NOTE: For replacement pages for IAC, see IAC Supplement 3/24/99.

**ARC 8790A****PUBLIC SAFETY  
DEPARTMENT[661]****Adopted and Filed Emergency**

Pursuant to the authority of Iowa Code section 692.10, the Department of Public Safety hereby amends Chapter 11, "Identification Section of the Division of Criminal Investigation," Iowa Administrative Code.

Iowa Code chapter 692 regulates access to Iowa criminal history records and through the Iowa Division of Criminal Investigation, in conjunction with federal law, to national criminal history files maintained by the Federal Bureau of Investigation. Access to national criminal history checks until recently was limited to criminal justice agencies and to non-criminal justice agencies only in circumstances in which a national criminal history check was explicitly allowed by state law. This provision has been relaxed so that non-criminal justice agencies involved in the care of children, the elderly, or the disabled may obtain national criminal history information in the absence of a specific authorization or requirement in state law to do so. The amendments adopted herein align relevant provisions of Chapter 11 of the administrative rules of the Department of Public Safety with the revised provisions of federal law. In addition, information about on-line access to forms to request criminal history information is added.

Pursuant to Iowa Code subsection 17A.4(2), the Department finds that notice and public participation prior to the adoption of these amendments is impracticable and unnecessary, as the amendments relax restrictions on access to criminal history records in accordance with changes in federal law. Timely adoption of these amendments will facilitate access to national criminal history checks by non-criminal justice agencies providing care to children, the elderly, and the disabled.

Pursuant to Iowa Code section 17A.5(2)"b"(2), the Department further finds that the normal effective date of these amendments, 35 days after publication, should be waived and the amendments made effective March 1, 1999, after filing with the Administrative Rules Coordinator. These amendments confer a benefit upon the public by enabling the Department to provide access to national criminal history information to agencies providing care to children, the elderly, and the disabled.

These amendments became effective on March 1, 1999.

The following amendments are adopted.

ITEM 1. Amend rule **661—11.2(17A,690,692)** by adopting the following **new** definitions in alphabetical order:

## PUBLIC SAFETY DEPARTMENT[661](cont'd)

"Authorized agency" means a division or office of the state of Iowa designated by a state to report, receive, or disseminate information under Iowa state law, administrative rule or Public Law 103-209.

"Employee" means a person who provides services to a qualified entity and is compensated for those services.

"Fee" means any cost associated with conducting a state or national criminal history record check.

"Fitness determination" means an analysis of criminal history information to determine whether or not it disqualifies an individual from holding a particular position either as an employee or a volunteer.

"National record check" means a criminal history record check from the FBI that is fingerprint-based and is transmitted through the state central repository.

"Qualified entity" means a business or organization, whether public, private, for-profit, not-for-profit, or voluntary, that provides child care or child care placement services, including a business or organization that licenses or certifies others to provide child care or child care placement services. This definition also applies to organizations which provide care to the elderly or the disabled.

"Volunteer" means a person who provides services to a qualified entity without compensation.

ITEM 2. Amend rule 661—11.5(690,692) as follows:

**661—11.5(690,692) Review of record.** Any individual or that individual's attorney, acting with written authorization from the individual, may review or obtain a copy of the individual's criminal history record during normal business hours at the headquarters of the division in the Wallace State Office Building in Des Moines or by submitting a request on a form provided by the department of public safety. A copy of this request form may be obtained by writing to Identification Section, Division of Criminal Investigation, Department of Public Safety, Wallace State Office Building, Des Moines, Iowa 50319, or by telephoning the identification section at

(515)281-8706 or by sending a request by electronic mail to [cchinfo@dps.state.ia.us](mailto:cchinfo@dps.state.ia.us). The request form may also be downloaded from the division's Web site at <http://www.state.ia.us/government/dps/dci/>. The completed request form must be notarized, if submitted by mail, and accompanied by a set of the fingerprints of the individual whose criminal history record is being requested, along with submission of the fee established in rule 661—11.15(692). After the record check has been completed, the fingerprints submitted for verification shall be returned, upon request, or destroyed.

ITEM 3. Amend 661—Chapter 11 by adopting the following **new** rule:

**661—11.21(692) Criminal history checks for qualified entities.**

**11.21(1)** The department of public safety may process requests for national criminal history record checks for a qualified entity.

**11.21(2)** All qualified entities requesting criminal history record checks shall be required to pay any applicable state and federal fees associated with non-criminal justice record checks. The qualified entity is responsible for such fees whether the qualified entity requests or receives the information directly or through an agency authorized to make fitness determinations as provided in subrule 11.21(3).

**11.21(3)** Any public entity which has been duly authorized by statute or administrative rule to conduct fitness determinations of volunteers or employees of a qualified entity may receive state and national criminal history checks in order to do so.

[Filed Emergency 3/1/99, effective 3/1/99]

[Published 3/24/99]

EDITOR'S NOTE: For replacement pages for IAC, see IAC Supplement 3/24/99.

## ARC 8807A

ETHICS AND CAMPAIGN  
DISCLOSURE BOARD, IOWA[351]

## Adopted and Filed

Pursuant to the authority of Iowa Code sections 17A.3 and 68B.32A, the Iowa Ethics and Campaign Disclosure Board amends Chapter 1, "Complaint, Investigation, and Resolution Procedure"; Chapter 3, "County Commissioners of Election"; Chapter 4, "Campaign Disclosure Procedures"; Chapter 5, "Ethics and Campaign Disclosure Board"; Chapter 6, "Civil Penalties"; Chapter 7, "Contested Case Procedures"; Chapter 9, "Declaratory Rulings"; Chapter 11, "Personal Financial Disclosure"; and Chapter 12, "Codes of Conduct," Iowa Administrative Code.

Notice of Intended Action was published in the Iowa Administrative Bulletin on January 13, 1999, as ARC 8610A. One comment was received from a member of the public who objected to the definition of "date of contribution" in Item 12. The commenter stated this would force out-of-state PACs to adjust internal procedures to file a VSR form within ten days of the date on the contribution check instead of within ten days of mailing the check. No change was made to the item. In Item 5, paragraph "c" was changed to reflect comments from the Administrative Rules Review Committee.

These amendments accomplish the following:

Item 1 allows the board to treat a contested case proceeding, requested by an individual contesting administrative resolution of a routine enforcement matter, the same as any other contested case proceeding as far as the possible imposition of sanctions.

Item 2 rescinds a rule that implemented a statute that was repealed by the 1997 General Assembly. Thus, the rule is no longer supported by statute.

Item 3 substitutes the words "expressly advocate" for "support or oppose". This change is necessary to comply with a recent federal court ruling in which it was determined that the phrase "support or oppose" was overbroad and unconstitutional.

Items 4, 5 and 6 enumerate additional items that may be purchased with campaign funds.

Item 7 clarifies the "paid for by" disclaimer statement that is required for candidates' committees and political committees.

Item 8 amends the definition of a "political corporation" to bring the rule into line with the Day v. Holahan case and a recent federal court ruling in which the current rule was determined to be unconstitutional due to the holding of that case.

Items 9 and 10 amend the current board policy by requiring an affirmative vote of four board members for a motion to pass, including the issuance of an advisory opinion.

Item 11 changes "declaratory ruling" to "declaratory order" as required by 1998 Iowa Acts, chapter 1202, which amends Iowa Code chapter 17A.

Item 12 makes a technical change to reflect a previous change in Chapter 4. It also puts into rule a current board policy concerning the definition of "date of the contribution."

Item 13 provides that in addition to the automatically assessed civil penalties for the late filing of a disclosure report, additional sanctions may be imposed if the matter goes to a contested case proceeding and a violation is proven.

Items 14 through 20 reflect the changes required by 1998 Iowa Acts, chapter 1202, which amends Iowa Code chapter 17A, and adopt language from the uniform rules as they apply to contested cases.

Item 21 reflects the changes required by 1998 Iowa Acts, chapter 1202, which amends Iowa Code chapter 17A, and adopts language from the uniform rules as they apply to changing "declaratory rulings" to "declaratory orders." Also, the word "agency" is changed to "board" when appropriate for reading ease.

Items 22 through 24 clarify the filing of personal financial disclosure statements by executive branch employees. In addition, penalties for the late filing and procedures for requesting waivers are set out.

Item 25 prohibits board members and employees from attending a political party or candidate event except for those of federal candidates. This is to remove even the appearance of impropriety on the part of board members and staff.

These amendments are intended to implement Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202, and chapters 56 and 68B.

These amendments will become effective April 28, 1999. The following amendments are adopted.

ITEM 1. Amend subrule 1.4(4) as follows:

**1.4(4)** Upon timely receipt of a request for a contested case proceeding to challenge administrative resolution of a routine enforcement matter, the board shall provide for the issuance of a statement of charges and notice of hearing. The contested case shall be conducted in accordance with the provisions of 351—Chapter 7. The burden shall remain on board staff to prove that a violation has occurred. Failure to challenge the administrative resolution through a request for a contested case proceeding is a failure to exhaust administrative remedies. *If, after a determination that a violation did occur, any sanctions under Iowa Code section 68B.32D may be imposed. These sanctions would be in addition to the original administrative resolution challenged.*

ITEM 2. Rescind rule 351—3.4(56) as follows:

~~**351—3.4(56) Ballot information provided.** Each time a county commissioner of elections prints a ballot for an election, the commissioner shall submit to the board either:~~

~~**3.4(1)** A copy of the sample ballot if it includes all candidates and ballot issues to be considered by the electorate in that particular election, or~~

~~**3.4(2)** A list of all candidates and offices sought and ballot issues to be considered by the electorate in that particular election, or~~

~~**3.4(3)** A copy of the ballot and election information as published by the county commissioner of elections pursuant to Iowa Code section 49.53.~~

ITEM 3. Adopt new subrule 4.1(4) as follows:

**4.1(4)** Substitution of definition. Anywhere in this chapter that the term "support or oppose" appears, insert the phrase "expressly advocates". Anywhere in this chapter that either the word "support" or "oppose" appears, insert the phrase "expressly advocates". As used in this chapter, "expressly advocates" means "express advocacy" as defined in subrule 4.100(1). If it is determined that paragraph 4.100(1)"b" is unconstitutional by a court of law, then "expressly advocates" will mean "express advocacy" as that term is defined in paragraph 4.100(1)"a."

ITEM 4. Amend subrule **4.42(1)** by adopting the following new paragraph "aa":

## ETHICS AND CAMPAIGN DISCLOSURE BOARD, IOWA[351](cont'd)

aa. Expenses incurred with respect to an election recount as provided in Iowa Code section 50.48.

ITEM 5. Amend subrule 4.42(2) by adopting the following new paragraphs "c" to "f":

c. Meals and other expenses incurred in connection with attending a local meeting to which the officeholder is invited and attends due to the officeholder's official position as an elected official.

d. Purchases of small, incidental items such as pencils, pens, rulers and bookmarks provided to members of the public touring the offices of the state or a political subdivision. However, such items distributed on public property shall not expressly advocate the election or defeat of a candidate or the adoption or defeat of a ballot issue as prohibited in Iowa Code section 56.12A. For example, a bookmark bearing the state seal could be distributed on public property, while a bookmark that identified the donor as a candidate for office could not be distributed on public property.

e. Gifts purchased for foreign dignitaries when the officeholder is part of an official trip out of the country such as a trade mission or exchange program.

f. Printing of additional stationery and supplies above the standard allotment of the state or political subdivision.

ITEM 6. Amend subrule 4.42(3) by adopting the following new paragraph "d":

d. Holiday and other greeting cards sent to constituents.

ITEM 7. Rescind subrule 4.70(1) and adopt new subrule 4.70(1) in lieu thereof:

**4.70(1)** Short form statement. If the advertisement or other material is paid for by the candidate or candidate's committee, who has filed a statement of organization under Iowa Code chapter 56, and the specific name and address are available to the public, the statement will be acceptable if it contains the words, "Paid for by the Candidate", "Paid for by (candidate's name), Candidate" or "Paid for by the Candidate's Committee", whichever is applicable. If the advertisement or other material is paid for by a political committee, which has filed a statement of organization under Iowa Code chapter 56, and the specific name and address are available to the public, the statement will be acceptable if it contains the words, "Paid for by the (name of the committee)".

ITEM 8. Amend rule 351—4.86(56,68B) as follows:

**351—4.86(56,68B) Political corporations.** The prohibitions applicable to corporate entities shall not apply to political corporations which meet all parts of the following tests based on the following factors:

1. The corporation was organized solely for political purposes and ~~cannot engage in business activities~~ *engages in minor business activities that generate minimal income and are incidental to its political purposes.*

2. The corporation is not sponsored by a business corporation or labor union, and has a policy of ~~refusing contributions from corporations or unions~~ *accepting only an insignificant and insubstantial amount of contributions from business corporations or labor unions.*

3. The corporation has no shareholders or others which have claims on its assets or earnings.

A corporate entity may apply for status as a political corporation under Iowa Code chapter 56 by submitting a letter signed by a corporate officer which affirms the above requirements and provides other pertinent details of the corporation's activities. A letter of approval or denial from the board will be provided to the corporation. The accep-

tion of contributions from a corporation seeking status as a political corporation is subject to the letter of approval and, if approval is not granted, any corporate contributions received shall be refunded by the candidates' committees or other political committees.

This rule is intended to implement Iowa Code section 56.15.

ITEM 9. Amend subrule 5.1(1) as follows:

**5.1(1)** The ethics and campaign disclosure board consists of six members appointed by the governor and confirmed by the senate. At the first meeting in each calendar year the members elect a chair and a vice chair, each to serve a one-year term. Meetings of the board are held, usually in alternate months, at the call of the chair at the time, place and date set by the chair. Meetings may occasionally be conducted by electronic means. When possible, meetings are announced at least one week in advance; however, when one week's notice is not possible, meetings shall be announced at least 24 hours prior to the commencement of the meeting, in conformance with Iowa Code section 21.4. Notice of meetings shall be given by public notice to the media and also posted in the lobby of the board's offices and in the Office of the Governor, Statehouse, Des Moines, Iowa. The notice contains the tentative agenda of the meeting. Four board members constitute a quorum for conducting business of the board. *It takes an affirmative vote of four board members for a motion to pass.* Any interested party may attend and observe board meetings except for the portion that may be closed in accordance with Iowa Code section 21.5. Observers may use cameras or recording devices during the course of a meeting so long as the use of the devices does not materially hinder the proceedings. The meetings shall be generally conducted according to rules of parliamentary procedure. If possible, open session proceedings shall be electronically recorded by the board, and closed session proceedings shall be electronically recorded by the board. Minutes of meetings are available for viewing at the board offices. Copies may be obtained pursuant to the applicable copy fee schedule.

ITEM 10. Amend subrule 5.3(2) as follows:

**5.3(2)** An opinion request which qualifies under these rules shall be reviewed by board staff, who shall determine whether to recommend to the board that the question posed presents such a fundamental issue that formal board review and resolution is necessary. *If formal board review is conducted and a conclusion is determined by a majority vote of a quorum of the board four members of the board,* the board will issue a written formal opinion containing advice which will, if followed, constitute a defense to a complaint filed with the board. A person who receives a formal board opinion may, within 30 days after the issuance of the opinion, request modification or reconsideration of the opinion, which shall be deemed denied unless the board acts upon the request within 30 days of the receipt of the request.

ITEM 11. Amend subrule 5.3(5) as follows:

**5.3(5)** Nothing in this rule precludes a person who has received an informal board opinion or routine administrative advice from petitioning for a declaratory ~~ruling order~~ regarding a question which qualifies under 351—Chapter 9. The board will refuse to issue a declaratory ~~ruling order~~ to a person who has previously received a formal board opinion on the same question, unless the requester demonstrates a significant change in circumstances from those underlying the formal board opinion.

ITEM 12. Amend subrule 6.2(5) as follows:

## ETHICS AND CAMPAIGN DISCLOSURE BOARD, IOWA[351](cont'd)

**6.2(5)** Late-filed verified statements of registration. The board shall routinely assess and collect monetary penalties against committees which are organized in a jurisdiction other than Iowa and which choose to file a verified statement of registration (VSR) as provided in Iowa Code section 56.5 and rule ~~351—4.13(56)~~ **351—4.48(56,68B)**, but are delinquent in filing the VSR. A VSR is considered delinquent if it is not received on or before the tenth day after the date of the contribution, or mailed bearing a United States Postal Service postmark dated on or before the tenth day after the contribution. A flat late penalty of \$25 shall be assessed for late-filed VSRs, except that if it is a repeat delinquency by the same committee in a 12-month period, the flat late penalty shall be \$50. However, if the VSR is not filed within ten days after notice of the delinquency is sent to the committee by the board, the amount of the late-filing penalty shall increase to \$100 for a first-time delinquency, or to \$200 for a repeat delinquency by the same committee within a 12-month period. A VSR which is not filed within 45 days after the notice is sent by the board shall be referred to as an extreme delinquency and shall be subject to the provisions of subrule 6.2(4). In addition, a committee which has received a contribution from a committee which has failed to file a VSR may be required to return the contribution.

*For purposes of this subrule, "date of the contribution" means the day, month and year the contribution check is dated. If the board deems it necessary, a copy of any check may be required to be filed with the board. When a copy of a check is required to be filed with the board, said copy shall be filed within ten days of notice by the board.*

ITEM 13. Amend rule 351—6.4(56) as follows:

**351—6.4(56) Payment of penalty.** The remittance shall be made payable and forwarded to: Iowa Ethics and Campaign Disclosure Board, 514 E. Locust Street, Suite 104, Des Moines, Iowa 50309.

After recording, the remittance shall be deposited in the general fund of the state of Iowa and, if the committee has provided a self-addressed, stamped envelope, a receipt will be issued by the board to the committee.

Payment may be made at the discretion of the delinquent committee, from the funds of the committee or from personal funds of an officer of the committee, or, in the case of a candidate, from the candidate's personal funds. If payment is made from a source other than committee funds, the fine payment shall be listed as an in-kind contribution to the committee. Fine payments from corporate entities as described in Iowa Code section ~~56.29~~ **56.15** are prohibited, except in the case of ballot issue committees.

*The penalties in this chapter shall be in addition to any civil penalties imposed pursuant to Iowa Code section 68B.32D(1) "h" after a contested case proceeding held under Iowa Code section 68B.32C.*

This rule is intended to implement Iowa Code section ~~56.10~~ **56.6**.

ITEM 14. Amend rule 351—7.2(17A,68B) as follows:

**351—7.2(17A,68B) Definitions.** Except where otherwise specifically defined by law:

"Contested case" means a proceeding defined by Iowa Code section ~~17A.2(2)~~ **17A.2(5)** and includes any matter defined as a no factual dispute contested case under 1998 Iowa Acts, chapter 1202, section 14.

"Issuance" means the date of mailing of a decision or order or date of delivery if service is by other means unless another date is specified in the order.

"Party" means each person or agency named or admitted as a party or properly seeking and entitled as of right to be admitted as a party.

"Presiding officer" means the board chairperson, the board member designated as chair of a hearing panel; ~~or the administrative law judge, if any, assisting the board or a hearing panel or the administrative law judge assigned by the division of administrative hearings;~~ except that, with regard to substantive or dispositive motions, "presiding officer" means all participating members of the board.

"Proposed decision" means the presiding officer's recommended findings of fact, conclusions of law, decision, and order in a contested case in which the Iowa ethics and campaign disclosure board did not preside.

ITEM 15. Amend rule 351—7.4(17A,68B) as follows:

**351—7.4(17A,68B) Requests for contested case proceeding.** Any person claiming an entitlement to a contested case proceeding shall file a written request for such a proceeding within the time specified by the particular rules or statutes governing the subject matter or, in the absence of such law, the time specified in the ~~agency board~~ action in question.

*Upon petition by any party in a matter that would be a contested case if there was a dispute over the existence of material facts, all of the provisions of this chapter, except those relating to presentation of evidence, shall be applicable even though there is no factual dispute in the particular case.*

The request for a contested case proceeding should state the name and address of the requester, identify the specific ~~agency board~~ action which is disputed, and where the requester is represented by a lawyer identify the provisions of law or precedent requiring or authorizing the holding of a contested case proceeding in the particular circumstances involved, and include a short and plain statement of the issues of material fact in dispute.

ITEM 16. Amend rule 351—7.5(17A,68B) as follows:

**351—7.5(17A,68B) Notice of hearing.**

**7.5(1) Delivery.** Delivery of the notice of hearing constitutes the commencement of the contested case proceeding. Delivery may be executed by:

- a. Personal service as provided in the Iowa Rules of Civil Procedure; or
- b. Certified mail, return receipt requested; or
- c. Publication, as provided in the Iowa Rules of Civil Procedure.

**7.5(2) Contents.** The notice of hearing shall contain the following information:

- a. A statement of the time, place, and nature of the hearing;
- b. A statement of the legal authority and jurisdiction under which the hearing is to be held;
- c. A reference to the particular sections of the statutes and rules involved;
- d. A short and plain statement of the matters asserted. If the ~~agency board~~ or other party is unable to state the matters in detail at the time the notice is served, the initial notice may be limited to a statement of the issues involved. Thereafter, upon application, a more definite and detailed statement shall be furnished;
- e. Identification of all parties including the name, address and telephone number of the person who will act as advocate for the ~~agency board~~ or the state and of parties' counsel where known;

## ETHICS AND CAMPAIGN DISCLOSURE BOARD, IOWA[351](cont'd)

- f. Reference to the procedural rules governing conduct of the contested case proceeding; and
- g. Reference to the procedural rules governing informal settlement; ;
- h. Identification of the presiding officer; and
- i. Notification of the time period in which a party may request, pursuant to 1998 Iowa Acts, chapter 1202, section 15, and subrule 7.8(3), that the presiding officer be an administrative law judge.

7.5(3) *Time.* The notice of hearing shall be served upon all parties at least 45 days before the scheduled hearing date.

ITEM 17. Amend rule 351—7.8(17A,68B) as follows:

**351—7.8(17A,68B) Disqualification; request for administrative law judge.**

7.8(1) A presiding officer or other person shall withdraw from participation in the making of any proposed or final decision in a contested case if that person:

- a. to c. No change.
- d. Has personally investigated the pending contested case by taking affirmative steps to interview witnesses directly or to obtain documents directly. The term "personally investigated" means taking affirmative steps to interview witnesses directly or to obtain documents or other information directly. It does not include either direction and supervision of assigned investigators or unsolicited receipt of oral information or documents which are relayed to assigned investigators, review of another person's investigative work product in the course of determining whether there is probable cause to initiate a proceeding, or exposure to factual information while performing other board functions, including fact gathering for purposes other than investigation of the matter which culminates in a contested case. Factual information relevant to the merits of a contested case received by a person who later serves as presiding officer in that case shall be disclosed if required by Iowa Code section 17A.17 as amended by 1998 Iowa Acts, chapter 1202, section 19, and rules in this chapter;
- e. to h. No change.

7.8(2) No change.

7.8(3) A party may, within ten days of delivery of a notice of hearing under subrule 7.5(1), request that the presiding officer be an administrative law judge assigned by the division of administrative hearings. This request shall be sent to the board's executive director who shall then notify the board. Except as otherwise provided by statute, the board shall grant such a request unless the board finds, and states the reasons for such finding, that any of the following conditions exist:

- a. There is a compelling need to expedite issuance of a final decision in order to protect the public health, safety, or welfare;
- b. A qualified administrative law judge is unavailable to hear the case within a reasonable time;
- c. The case involves significant policy issues of first impression that are inextricably intertwined with the factual issues presented;
- d. The demeanor of the witnesses is likely to be dispositive in resolving the disputed factual issues;
- e. Funds are unavailable to pay the costs of an administrative law judge and an intra-agency appeal;
- f. The request was not timely filed;
- g. The request is not consistent with a specified statute.

7.8(4) The board shall issue a written ruling specifying the grounds for the decision within ten days after a request for an administrative law judge is filed. If the ruling is con-

tingent upon the availability of an administrative law judge, the parties shall be notified at least ten days prior to hearing if an administrative law judge will not be available.

7.8(5) All rulings by an administrative law judge acting as presiding officer are subject to appeal to the board pursuant to rules 7.24(17A,68B) and 7.25(17A,68B). A party must seek intra-agency appeal in order to exhaust administrative remedies.

7.8(6) Unless otherwise provided by law, the board, when reviewing a proposed decision upon intra-agency appeal, shall have the powers of, and shall comply with, the provisions of this chapter which apply to presiding officers.

ITEM 18. Amend rule 351—7.14(17A,68B) as follows:

**351—7.14(17A,68B) Motions.**

7.14(1) No technical form for motions is required. However, prehearing motions must be in writing, state the grounds for relief, and state the relief sought. ~~Any motion for summary judgment shall comply with the Iowa Rules of Civil Procedure and is subject to disposition according to the requirements of those rules.~~

7.14(2) and 7.14(3) No change.

7.14(4) Motions pertaining to the hearing, including ~~except~~ motions for summary judgment, must be filed and served at least ten days ~~(or other time period designated by the agency)~~ prior to the date of hearing unless there is good cause for permitting later action or the time for such action is lengthened or shortened by rule of the ~~agency board~~ or an order of the presiding officer.

7.14(5) *Motions for summary judgment.* Motions for summary judgment shall comply with the requirements of Iowa Rule of Civil Procedure 237 and shall be subject to disposition according to the requirements of that rule to the extent such requirements are not inconsistent with the provisions of this rule or any other provision of law governing the procedure in contested cases.

Motions for summary judgment must be filed and served at least 30 days prior to the scheduled hearing date, or other time period determined by the presiding officer. Any party resisting the motion shall file and serve a resistance within 15 days, unless otherwise ordered by the presiding officer, from the date a copy of the motion was served. The time fixed for hearing or nonoral submission shall not be less than 10 days after the filing of the motion, unless a shorter time is ordered by the presiding officer. A summary judgment order rendered on all issues in a contested case is subject to appeal and rehearing pursuant to rules 7.26(17A,68B) and 7.27(17A,68B).

ITEM 19. Amend rule 351—7.21(17A,68B) as follows:

**351—7.21(17A,68B) Default.**

7.21(1) If a party fails to appear or participate in a contested case proceeding after proper service of notice, the presiding officer may, if no adjournment is granted, enter a default decision or proceed with the hearing and render a decision in the absence of the party.

7.21(2) Where appropriate and not contrary to law, any party may move for default against a party who has requested the contested case proceeding and has failed to file a required pleading or has failed to appear after proper service.

7.21(3) Default decisions or decisions rendered on the merits after a party has failed to appear or participate in a contested case proceeding become final agency action unless, within 14 days after the date of notification or mailing of the decision, a motion to vacate is filed and served on all parties or an appeal of a decision on the merits is timely initi-

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ated within the time provided by rule 7.26(17A,68B). A motion to vacate must state all facts relied upon by the moving party which establish that good cause existed for that party's failure to appear or participate at the contested case proceeding. Each fact so stated must be substantiated by at least one sworn affidavit of a person with personal knowledge of each such fact, which affidavit(s) must be attached to the motion.

7.21(4) The time for further appeal of a decision for which a timely motion to vacate has been filed is stayed pending a decision on the motion to vacate.

7.21(5) Properly substantiated and timely filed motions to vacate shall be granted only for good cause shown. The burden of proof as to good cause is on the moving party. Adverse parties shall have ten days to respond to a motion to vacate. Adverse parties shall be allowed to conduct discovery as to the issue of good cause and to present evidence on the issue prior to a decision on the motion, if a request to do so is included in that party's response.

7.21(6) "Good cause" for purposes of this rule shall have the same meaning as "good cause" for setting aside a default judgment under Iowa Rule of Civil Procedure 236.

7.21(7) A decision denying a motion to vacate is subject to further appeal within the time limit allowed for further appeal of a decision on the merits in the contested case proceeding. A decision granting a motion to vacate is subject to interlocutory appeal by the adverse party pursuant to rule 7.24(17A,68B).

7.21(8) If a motion to vacate is granted and no timely interlocutory appeal has been taken, the presiding officer shall issue another notice of hearing and the contested case shall proceed accordingly.

7.21(9) A default decision may award any relief consistent with the request for relief made in the petition and embraced in its issues but, unless the defaulting party has appeared, it cannot exceed the relief demanded.

7.21(10) A default decision may provide either that the default decision is to be stayed pending a timely motion to vacate or that the default decision is to take effect immediately, subject to a request for stay.

ITEM 20. Amend subrules 7.22(2) and 7.22(3) and adopt new subrule 7.22(4) as follows:

7.22(2) Disclosure of prohibited communications. Any person who receives a communication prohibited by subrule 7.22(1) shall disclose that communication to all parties. A copy of any prohibited written communication or a summary of any prohibited oral communication shall be submitted for inclusion in the record. Any party desiring to rebut the prohibited ex parte communication must be allowed to do so, upon requesting the opportunity for rebuttal within ten days after notice of the communication. If the effect of an ex parte communication is so prejudicial that it cannot be cured by disclosure and rebuttal, a presiding officer who receives the communication shall be disqualified and the portions of the record pertaining to the communication shall be sealed by protective order.

7.22(3) The board and any party may report any violation of this rule to appropriate authorities for any disciplinary proceedings provided by law. The presiding officer or the agency board may impose appropriate sanctions for violations of this rule. Possible sanctions include a decision against the offending party; censure, suspension, or revocation of the privilege to practice before the agency board; and censure, suspension, dismissal, or other disciplinary action against agency board personnel.

7.22(4) A party to a contested case proceeding may file a timely and sufficient affidavit alleging a violation of any provision of this rule. The board shall determine the matter as part of the record in the case. When the board makes such a determination with respect to a board member or board employee, that determination shall be subject to de novo judicial review in any subsequent review proceeding of the case.

ITEM 21. Amend 351—Chapter 9 as follows:

CHAPTER 9  
DECLARATORY RULINGS ORDERS

351—9.1(56) Petition for declaratory ruling order. Any person or agency may file a petition with the agency board for a declaratory ruling order concerning the applicability of any statute, rule, policy, decision, or order, administered by the agency board, at 514 E. Locust Street, Suite 104, Des Moines, Iowa 50309. A petition is deemed filed when it is received by that office. The agency board must shall provide the petitioner with a file-stamped copy of the petition if the petitioner provides the agency board an extra copy for this purpose. Within 15 days after receipt of a petition for a declaratory order, the board shall give notice of the petition to all persons to whom notice is required by any provision of law and may give notice to any other persons. Persons who qualify under any applicable provision of law as an intervenor, and who file timely petitions for intervention, may intervene in proceedings for declaratory orders. The petition must be typewritten or legibly handwritten in ink and must substantially conform to the following form:

IOWA ETHICS AND CAMPAIGN DISCLOSURE BOARD

Petition by (Name of Petitioner) }  
for a Declaratory Ruling Order } PETITION FOR  
on (Cite provisions of law } DECLARATORY  
involved). } RULING ORDER

The petition must provide the following information:

1. A clear and concise statement of all relevant facts on which the ruling order is requested.
2. A citation and the relevant language of the specific statutes, rules, policies, decisions, or orders, whose applicability is questioned, and any other relevant law.
3. The questions petitioner wants answered, stated clearly and concisely.
4. If applicable and desirable to the petitioner, the answers desired by the petitioner to these questions and a summary of the reasons urged by the petitioner in support of those answers.
5. The reasons for requesting the declaratory ruling order and disclosure of the petitioner's interest in the outcome.
6. A statement indicating whether the petitioner is currently a party to another proceeding involving the questions at issue, or whether to the petitioner's knowledge, those questions have not been decided by, are not pending determination by, or are not under investigation by, any governmental entity.
7. The names and addresses of other persons, or a description of any class of persons, known by petitioner to be affected by, or interested in, the questions presented in the petition.
8. Any request by petitioner for a meeting provided for by rule 351—9.4(56).

The petition must be dated and signed by the petitioner or the petitioner's representative. It must also include the

## ETHICS AND CAMPAIGN DISCLOSURE BOARD, IOWA[351](cont'd)

name, mailing address, and telephone number of the petitioner and petitioner's representative (if one is involved), and a statement indicating the person to whom communications concerning the petition should be directed.

**351—9.2(56) Briefs.** The petitioner may attach a brief to the petition in support of the position urged in the petition. The *agency board* may request a brief from the petitioner or from any other person concerning the questions raised in the petition. *A requested brief shall be filed within ten days of receipt of notice from the board.*

**351—9.3(56) Inquiries.** Inquiries concerning the status of a petition for a declaratory *ruling order* may be made to the Executive Director, Iowa Ethics and Campaign Disclosure Board, 514 E. Locust Street, Suite 104, Des Moines, Iowa 50309.

**351—9.4(56) Agency consideration.** Upon request by petitioner in the petition, the *agency board* ~~must~~ *shall* schedule a brief and informal meeting between the petitioner and the ~~agency, a member of the agency, or a member of the staff of the agency,~~ *board's executive director or legal counsel* to discuss the petition. The *agency board* may request the petitioner to submit additional information or argument concerning the petition. The *agency board* may solicit comments from any person on the questions presented in the petition. Also, comments on those questions may be submitted to the *agency board* by any person.

Within ~~60~~ *30* days after the filing of the petition, or 5 days following a regular meeting of the board in which the petition has been received and discussed, whichever comes earlier, or within any longer period agreed to by the petitioner, the *agency board* ~~must, shall,~~ in writing, issue a *ruling an order* on the petition ~~or refuse to do so,~~ *set the matter for specified proceedings, agree to issue a declaratory order by a specified time or decline to issue the order and state the reasons for doing so.* ~~An agency~~ The board is deemed to have issued a *ruling an order* or to have refused to do so on the date the *ruling order* or refusal is mailed or delivered to petitioner. *If the board does not issue a declaratory order within 60 days after receipt of a petition therefor, or such later time as agreed by the parties, the petition is deemed to have been denied.*

**351—9.5(56) Refusal to issue *ruling order*.** The *agency board* may refuse to issue a declaratory *ruling order* for good cause. Good cause includes, but is not limited to, the following reasons:

1. The petition does not substantially comply with the required form.
2. The petition does not contain facts sufficient to demonstrate that the petitioner will be aggrieved or adversely affected by the failure of the *agency board* to issue a *ruling an order*.
3. The *agency board* does not have jurisdiction over the questions presented in the petition.
4. The questions presented by the petition are also presented in a current rule making, contested case, or other agency or judicial proceeding, that may definitively resolve them.
5. The questions presented by the petition would more properly be resolved in a different type of proceeding or by another body with jurisdiction over the matter.
6. The facts or questions presented in the petition are unclear, overbroad, insufficient, or otherwise inappropriate as a basis upon which to issue a *ruling an order*.

7. There is no need to issue a *ruling an order* because the questions raised in the petition have been settled due to a change in circumstances.

8. The petition is not based upon facts calculated to aid in the planning of future conduct but is, instead, based solely upon prior conduct in an effort to establish the effect of that conduct or to challenge an *agency a board* decision already made.

9. The petition requests a declaratory *ruling order* that would necessarily determine the legal rights, duties, or responsibilities of other persons who have not joined in the petition or filed a similar petition and whose position on the questions presented may fairly be presumed to be adverse to that of petitioner.

10. The petitioner requests the *agency board* to determine whether a statute is unconstitutional on its face.

**9.5(1)** A refusal to issue a declaratory *ruling order* must indicate the specific grounds for the refusal and constitutes final agency action on the petition. *Once the board declines to issue a declaratory order, or if the petition is deemed to have been denied because such an order has not been entered within 60 days, a party to the proceeding may either seek judicial review or await further board action with respect to its petition.*

**9.5(2)** Refusal to issue a declaratory *ruling order* pursuant to this provision does not preclude the filing of a new petition that seeks to eliminate the grounds for the *agency's board's* refusal to issue a *ruling an order*.

**351—9.6(56) Contents of declaratory *ruling order*—effective date.** In addition to the *ruling order* itself, a declaratory *ruling order* must contain the date of its issuance, the name of petitioner, the specific statutes, rules, policies, decisions, or orders involved, the particular facts upon which it is based, and the reasons for its conclusion.

A declaratory *ruling order* is effective on the date of issuance.

**351—9.7(56) Effect of a declaratory *ruling order*.** A declaratory *ruling order* is binding on the *agency board* and the petitioner and is applicable only in circumstances where the relevant facts and the law involved are indistinguishable from those contained in the petition. As to all other persons, a declaratory *ruling order* serves only as precedent and is not binding on the *agency board*. The issuance of a declaratory *ruling order* constitutes final agency action on the petition.

These rules are intended to implement Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202, and Iowa Code chapter 56.

ITEM 22. Adopt new rule 351—11.4(68B) as follows:

**351—11.4(68B) Disclosure statement.**

**11.4(1)** Late if not received or postmarked with a United States Postal Service postmark. A personal financial disclosure statement is deemed to be delinquent if it is not physically received in the office of the board or mailed bearing a United States Postal Service postmark dated on or before the report due date. Private postage meters are not acceptable as proof of timely mailing.

**11.4(2)** Extension for holidays. If the due date falls on a Saturday, Sunday, or holiday on which the board office is closed, the filing due date is extended to the first working day following, and personal financial disclosure statements received or properly postmarked on that day will not be considered to be delinquent. If the due date falls on a date on which the board's office is open, even though it is on a day that the United States Postal Service is not postmarking de-

## ETHICS AND CAMPAIGN DISCLOSURE BOARD, IOWA[351](cont'd)

posited mail, a disclosure statement is deemed to be delinquent if it is not received in the board's office on or before the due date or mailed bearing a United States Postal Service postmark dated before the due date.

**11.4(3)** Facsimile filing. Filing by electronic facsimile is acceptable to prevent a disclosure statement from being deemed delinquent. However, the original statement must be filed to replace the facsimile filing within ten days of the date the facsimile was transmitted.

ITEM 23. Adopt **new** rule 351—11.5(68B) as follows:

**351—11.5(68B) Penalties.**

**11.5(1)** Penalties for late personal financial disclosure statements. Any affected member of the executive branch, or candidate for statewide office, that fails to timely file a required personal financial disclosure statement shall be subject to an automatic civil penalty according to the following schedule:

<u>Days Delinquent</u>	<u>Penalty Amount</u>
1 to 14	\$ 25
15 to 30	\$ 50
31 and over	\$ 100

**11.5(2)** Requests for waiver or reduction of assessed penalties. Any person who is assessed a penalty under this chapter may apply to the Iowa ethics and campaign disclosure board for consideration of a waiver or reduction of the assessed amount.

**11.5(3)** Additional penalty. If an affected member of the executive branch, or a candidate for statewide office, fails to file a personal financial disclosure statement within 45 days of the required filing date, a contested case proceeding may be held to determine whether or not a violation has occurred. If, after notice and opportunity to be heard, it is determined that a violation occurred, any of the sanctions under Iowa Code section 68B.32D may be imposed. Any sanction under Iowa Code section 68B.32D would be in addition to an automatically assessed penalty under this chapter.

**11.5(4)** Payment of penalty. The remittance shall be made payable and forwarded to the Iowa Ethics and Campaign Disclosure Board, 514 E. Locust Street, Suite 104, Des Moines, Iowa 50309.

After recording, the remittance shall be deposited in the general fund of the state of Iowa and, if the person has provided a self-addressed, stamped envelope, a receipt will be issued by the board to the person.

ITEM 24. Adopt **new** rule 351—11.6(68B) as follows:

**351—11.6(68B) Failure to file true statement.** It shall be a violation of this rule for any affected member of the executive branch, or candidate for statewide office, to file a disclosure statement containing false or fraudulent information. Complaints concerning the filing of a false or fraudulent disclosure statement shall be governed by the provisions of Iowa Code chapter 68B. If it is determined after a contested case proceeding that a false or fraudulent disclosure statement was filed, the board may impose any of the actions under Iowa Code section 68B.32D.

ITEM 25. Amend subrule 12.1(7) as follows:

**12.1(7)** Attendance at a political party or candidate event is **permitted prohibited except for the attendance at events**

*for a federal candidate since the board has no jurisdiction over a federal candidate.*

[Filed 3/3/99, effective 4/28/99]

[Published 3/24/99]

EDITOR'S NOTE: For replacement pages for IAC, see IAC Supplement 3/24/99.

**ARC 8801A****HUMAN SERVICES  
DEPARTMENT[441]****Adopted and Filed**

Pursuant to the authority of Iowa Code section 225C.6, the Department of Human Services hereby amends Chapter 24, "Accreditation or Certification of Providers of Services to Persons With Mental Illness, Mental Retardation, and Developmental Disabilities," appearing in the Iowa Administrative Code.

The Mental Health and Developmental Disabilities Commission adopted these amendments March 2, 1999. Notice of Intended Action regarding these amendments was published in the Iowa Administrative Bulletin on December 30, 1998, as **ARC 8578A**.

These amendments modify accreditation standards for mental health service providers to clarify the requirements for service plans and expand the definition of staff permitted to provide emergency services.

Service plans are required to be developed by the consumer with the organization, to be written in language understandable by the consumer, and to identify observable and measurable goals and objectives. The clarification to the service plan was requested by providers.

Emergency clinical assessment and psychotherapeutic services are to be provided by one of the following:

- A person who holds a master's degree in a mental health field, including, but not limited to, psychology, counseling and guidance, psychiatric nursing, psychiatric rehabilitation, and social work who has training in emergency services and who has access, at least by telephone, to a mental health professional, if indicated.
- A person who holds a bachelor's degree in a human service discipline with five years' experience providing mental health services or human services who has training in emergency services and who has access, at least by telephone, to a mental health professional.
- A psychiatric nurse with three years of clinical experience in mental health who has training in emergency services and who has access, at least by telephone, to a mental health professional.

The change to staff requirements for emergency services was made due to the difficulty smaller counties have finding mental health professionals to staff emergency services. Community mental health centers and other mental health providers will be able to more readily find staff for emergency services.

These amendments are identical to those published under Notice of Intended Action.

These amendments are intended to implement Iowa Code chapter 225C.

These amendments shall become effective May 1, 1999. The following amendments are adopted.

## HUMAN SERVICES DEPARTMENT[441](cont'd)

ITEM 1. Amend rule **441—24.1(225C)**, definition of "Service plan," as follows:

"Service plan" means ~~a written~~ *an individually goal-oriented plan of services written in language understandable by the consumer, and developed for a consumer by the consumer and with the organization.*

ITEM 2. Amend subrule **24.2(2)**, paragraph "b," subparagraphs (1) and (3), as follows:

(1) The service plan is based on the assessment ~~and social history~~ and identifies *observable and measurable* consumer goals and objectives, *desires*, time lines, and the actions, interventions, ~~and or~~ supports needed to meet ~~the~~ *those* goals ~~and objectives and includes discharge planning. The service plan includes the persons or organizations responsible for carrying out the interventions or supports as well as the discharge plan for the consumer.~~

(3) ~~Goals and objectives reflect consumer collaboration, agreement and desired outcomes. The selection and wording of the goals and objectives and desired outcomes reflect consumer collaboration.~~

ITEM 3. Amend subrule **24.3(7)**, introductory paragraph, as follows:

**24.3(7)** Emergency services. Emergency services are crisis services that provide a focused assessment and rapid stabilization of acute symptoms of mental illness or emotional distress, and are available and accessible, by telephone or face-to-face, to consumers on a 24-hour basis. ~~The degree of clinical assessment and psychotherapeutic services is determined and shall be provided by a mental health professional with training in crises services~~ *person who holds a master's degree in a mental health field, including, but not limited to, psychology, counseling and guidance, psychiatric nursing, psychiatric rehabilitation, or social work who has training in emergency services and who has access, at least by telephone, to a mental health professional, if indicated; or a person who holds a bachelor's degree in a human service discipline with five years' experience providing mental health services or human services who has training in emergency services and who has access, at least by telephone, to a mental health professional; or a psychiatric nurse with three years of clinical experience in mental health who has training in emergency services and who has access, at least by telephone, to a mental health professional.* A comprehensive social history is not required for this ~~assessment~~ *treatment.*

Further amend subrule **24.3(7)**, paragraph "b," subparagraph (3), as follows:

(3) Consumers receive ~~clinical~~ assessments and services from ~~either a mental health professional who has been trained in emergency services~~ *professional or from personnel who meet the requirements above and are supervised by a mental health professional.* Psychiatric consultation is available, if needed.

[Filed 3/3/99, effective 5/1/99]

[Published 3/24/99]

EDITOR'S NOTE: For replacement pages for IAC, see IAC Supplement 3/24/99.

ARC 8848A

## INSURANCE DIVISION[191]

Adopted and Filed

Pursuant to the authority of Iowa Code subsection 505.8(2), the Insurance Division hereby amends Chapter 5, "Regulation of Insurers—General Provisions," Chapter 15, "Unfair Trade Practices," Chapter 21, "Surplus Lines Requirements," Chapter 31, "Life Insurance Companies—Variable Annuities Contracts," Chapter 33, "Variable Life Insurance Model Regulation," Chapter 40, "Health Maintenance Organizations," and Chapter 45, "Insurance Holding Company Systems," Iowa Administrative Code.

The amendments delete outdated language and practices of the Division. Electronic filing of financial statements is now used. The term "agent" has been changed to "producer" under current law. Surplus line forms no longer used have been deleted. There have been changes in producer examination requirements. Some financial information once required to be filed with the Commissioner is now filed only upon the request of the Commissioner.

Notice of Intended Action was published in the Iowa Administrative Bulletin on November 4, 1998, as **ARC 8440A**. These amendments are identical to those published under Notice of Intended Action.

These amendments were adopted by the Commissioner on February 19, 1999.

These amendments are intended to implement Iowa Code subsection 505.8(2).

These amendments will become effective April 28, 1999.

EDITOR'S NOTE: Pursuant to recommendation of the Administrative Rules Review Committee published in the Iowa Administrative Bulletin, September 10, 1986, the text of these amendments [amendments to Chs 5, 15, 21, 31, 33, 40, and 45] is being omitted. These amendments are identical to those published under Notice as **ARC 8440A**, IAB 11/4/98.

[Filed 3/5/99, effective 4/28/99]

[Published 3/24/99]

[For replacement pages for IAC, see IAC Supplement 3/24/99.]

ARC 8837A

## INSURANCE DIVISION[191]

Adopted and Filed

Pursuant to the authority of Iowa Code sections 523A.16 and 523E.16, the Insurance Division hereby amends Chapter 19, "Prearranged Funeral Contracts," Iowa Administrative Code.

Notice of Intended Action was published in the Iowa Administrative Bulletin on December 16, 1998, as **ARC 8574A**. No public comment was received on this rule. This rule is identical to that published under Notice of Intended Action.

This rule authorizes the administrator to deny, suspend, or revoke an application or sales permit of a salesperson, upon notification by the College Student Aid Commission of a default on obligations owed to or collected by the Commission.

This rule will become effective April 28, 1999.

## INSURANCE DIVISION[191](cont'd)

This rule is intended to implement Iowa Code sections 261.121 to 261.127.

The following rule is adopted.

Adopt **new** rule 191—19.24(261) as follows:

**191—19.24(261) Denial, suspension or revocation of sales permit for failure to pay debts owed to or collected by the college student aid commission.**

**19.24(1)** Issuance of notice. Upon receipt from the college student aid commission of a certificate of noncompliance for defaults on debts owed to or collected by the commission, the administrator shall issue a notice to a salesperson that the pending application for sales permit or current sales permit will be denied, suspended or revoked. The notice shall be served by restricted certified mail, return receipt requested, or by personal service in accordance with the Iowa Rules of Civil Procedure, unless the salesperson accepts service personally or through authorized counsel.

**19.24(2)** Notice contents. The notice referred to in subrule 19.24(1) shall state all of the following:

a. The administrator intends to deny, suspend, or revoke an application or sales permit in 30 days due to the receipt of a certificate of noncompliance from the college student aid commission.

b. The salesperson must contact the college student aid commission to schedule a conference or to otherwise obtain a withdrawal of a certificate of noncompliance.

c. Unless the college student aid commission furnishes to the administrator a withdrawal of a certificate of noncompliance within 30 days of issuance of the notice, the salesperson's application, request for renewal or current sales permit shall be denied, revoked or suspended.

d. The salesperson served shall not have a right to a hearing before the administrator but may request a court hearing pursuant to Iowa Code section 261.127 within 30 days of the provision of notice.

**19.24(3)** Automatic stay. The filing of an application for hearing with the district court pursuant to Iowa Code section 261.127 shall automatically stay action of the administrator until the administrator is notified of the resolution of the application.

**19.24(4)** Effective date of action. If the administrator does not receive a withdrawal of the certificate of noncompliance from the college student aid commission or a notice that an application for district court hearing has been filed, the administrator shall deny, suspend or revoke the application or sales permit 30 days after the notice prescribed in subrule 19.24(2) is issued.

**19.24(5)** Withdrawal of certificate. If the administrator receives a withdrawal of the certificate of noncompliance from the college student aid commission, the administrator shall immediately halt action to deny, suspend or revoke an application or sales permit. The salesperson shall be notified that action has been halted. If an application or sales permit has already been denied, suspended or revoked, the salesperson shall reapply for a sales permit and the application shall be granted if the individual is otherwise in compliance with applicable laws, rules, regulations or orders.

**19.24(6)** Application fees. All application fees must be paid by the salesperson before a sales permit will be issued, after the administrator has denied, suspended or revoked a sales permit pursuant to Iowa Code sections 261.121 to 261.127.

**19.24(7)** Sharing of information. Notwithstanding any statutory confidentiality provision, the administrator may share information with the college student aid commission

for the sole purpose of identifying salespersons subject to enforcement under Iowa Code sections 261.121 to 261.127.

[Filed 3/5/99, effective 4/28/99]

[Published 3/24/99]

EDITOR'S NOTE: For replacement pages for IAC, see IAC Supplement 3/24/99.

**ARC 8838A**

**INSURANCE DIVISION[191]**

**Adopted and Filed**

Pursuant to the authority of Iowa Code section 502.607, the Insurance Division hereby amends Chapter 50, "Regulation of Securities Offerings and Those Who Engage in the Securities Business," Iowa Administrative Code.

Notice of Intended Action was published in the Iowa Administrative Bulletin on December 16, 1998, as **ARC 8573A**. No public comment was received on this rule. This rule is identical to that published under Notice of Intended Action.

This rule authorizes the administrator to deny, suspend, or revoke an application or license of a securities agent or investment adviser representative, upon notification by the College Student Aid Commission of a default on obligations owed to or collected by the Commission.

This rule shall become effective April 28, 1999.

This rule is intended to implement Iowa Code sections 261.121 to 261.127.

The following rule is adopted.

Adopt **new** rule 191—50.6(261) as follows:

**191—50.6(261) Denial, suspension or revocation of license for failure to pay debts owed to or collected by the college student aid commission.**

**50.6(1)** Issuance of notice. Upon receipt from the college student aid commission of a certificate of noncompliance for defaults on debts owed to or collected by the commission, the administrator shall issue a notice to a securities agent or investment adviser representative applicant or licensee that the pending application for licensure or current license will be denied, suspended or revoked. The notice shall be served by restricted certified mail, return receipt requested, or by personal service in accordance with the Iowa Rules of Civil Procedure, unless the applicant or licensee accepts service personally or through authorized counsel.

**50.6(2)** Notice contents. The notice referred to in subrule 50.6(1) shall state all of the following:

a. The administrator intends to deny, suspend, or revoke an application or license due to the receipt of a certificate of noncompliance from the college student aid commission.

b. The applicant or licensee must contact the college student aid commission to schedule a conference or to otherwise obtain a withdrawal of a certificate of noncompliance.

c. Unless the college student aid commission furnishes to the administrator a withdrawal of a certificate of noncompliance within 30 days of issuance of the notice, the application or license shall be denied, revoked or suspended.

d. The applicant or licensee served shall not have a right to a hearing before the administrator but may request a court hearing pursuant to Iowa Code section 261.127 within 30 days of the provision of notice.

INSURANCE DIVISION[191](cont'd)

**50.6(3) Automatic stay.** The filing of an application for hearing with the district court pursuant to Iowa Code section 261.127 shall automatically stay action of the administrator until the administrator is notified of the resolution of the application.

**50.6(4) Effective date of action.** If the administrator does not receive a withdrawal of the certificate of noncompliance from the college student aid commission or a notice that an application for district court hearing has been filed, the administrator shall deny, suspend or revoke the application or license 30 days after the notice prescribed in subrule 50.6(2) is issued.

**50.6(5) Withdrawal of certificate.** If the administrator receives a withdrawal of the certificate of noncompliance from the college student aid commission, the administrator shall immediately halt action to deny, suspend or revoke an application or license. The applicant or licensee shall be notified that action has been halted. If an application or license has already been denied, suspended or revoked, the applicant or former licensee shall reapply for licensure and the application shall be granted if the individual is otherwise in compliance with applicable laws, rules, regulations or orders.

**50.6(6) Application fees.** All application fees must be paid by the applicant before a license will be issued, after the administrator has denied, suspended or revoked a license pursuant to Iowa Code sections 261.121 to 261.127.

**50.6(7) Sharing of information.** Notwithstanding any statutory confidentiality provision, the administrator may share information with the college student aid commission for the sole purpose of identifying applicants or licensees subject to enforcement under Iowa Code sections 261.121 to 261.127.

[Filed 3/5/99, effective 4/28/99]  
[Published 3/24/99]

EDITOR'S NOTE: For replacement pages for IAC, see IAC Supplement 3/24/99.

**ARC 8811A**

**PETROLEUM UNDERGROUND STORAGE TANK FUND BOARD, IOWA COMPREHENSIVE[591]**

**Adopted and Filed**

Pursuant to the authority of Iowa Code sections 455G.4, 455G.6, and 455G.11, the Iowa Comprehensive Petroleum Underground Storage Tank Fund Board (Board) hereby

amends Chapter 15, "Installers and Inspectors," Iowa Administrative Code.

Chapter 15 describes the guidelines for licensed individuals conducting installation and inspection services associated with underground storage tank systems which utilize program services. A portion of this chapter provides for insurance coverage provided by the Board for installers, liners, testers, and inspectors.

Iowa Code section 455G.11(10) states "the Board may cease offering insurance coverage under this subsection if the Board determines that competitive private market alternatives exist." Pursuant to this provision, the Board directed the Administrator to conduct an evaluation of the installer and inspector commercial insurance markets. A copy of that report is on file with the Board. The report indicated that the program had 46 policies in effect, covering 31 firms and 45 individuals. This represented coverage to only 35 percent of the licensed individuals and 49 percent of the companies. The report indicated that individuals and companies who also worked outside of the state of Iowa currently utilize the private market for coverage in other states. The report concluded that the majority of licensed companies and individuals currently utilize commercial insurance available in the private marketplace. A viable private market exists which appears capable of absorbing the program's current insured population and providing comparable insurance coverage.

These amendments will rescind the installer/inspector insurance program currently offered by the Board. These amendments are intended to become effective December 31, 1999. As a result of these amendments, the Board will not be able to provide insurance coverage under the installer/inspector insurance program after December 1999. These amendments will require that all licensed companies and individuals obtain their insurance coverage from the private market for work which occurs on or after January 1, 2000.

Notice of Intended Action was published in the January 13, 1999, Iowa Administrative Bulletin as **ARC 8606A**. The adopted amendments are identical to those published under Notice.

These amendments were approved February 25, 1999.

These amendments will become effective on December 31, 1999.

These amendments are intended to implement Iowa Code sections 455G.4, 455G.6, and 455G.11(10).

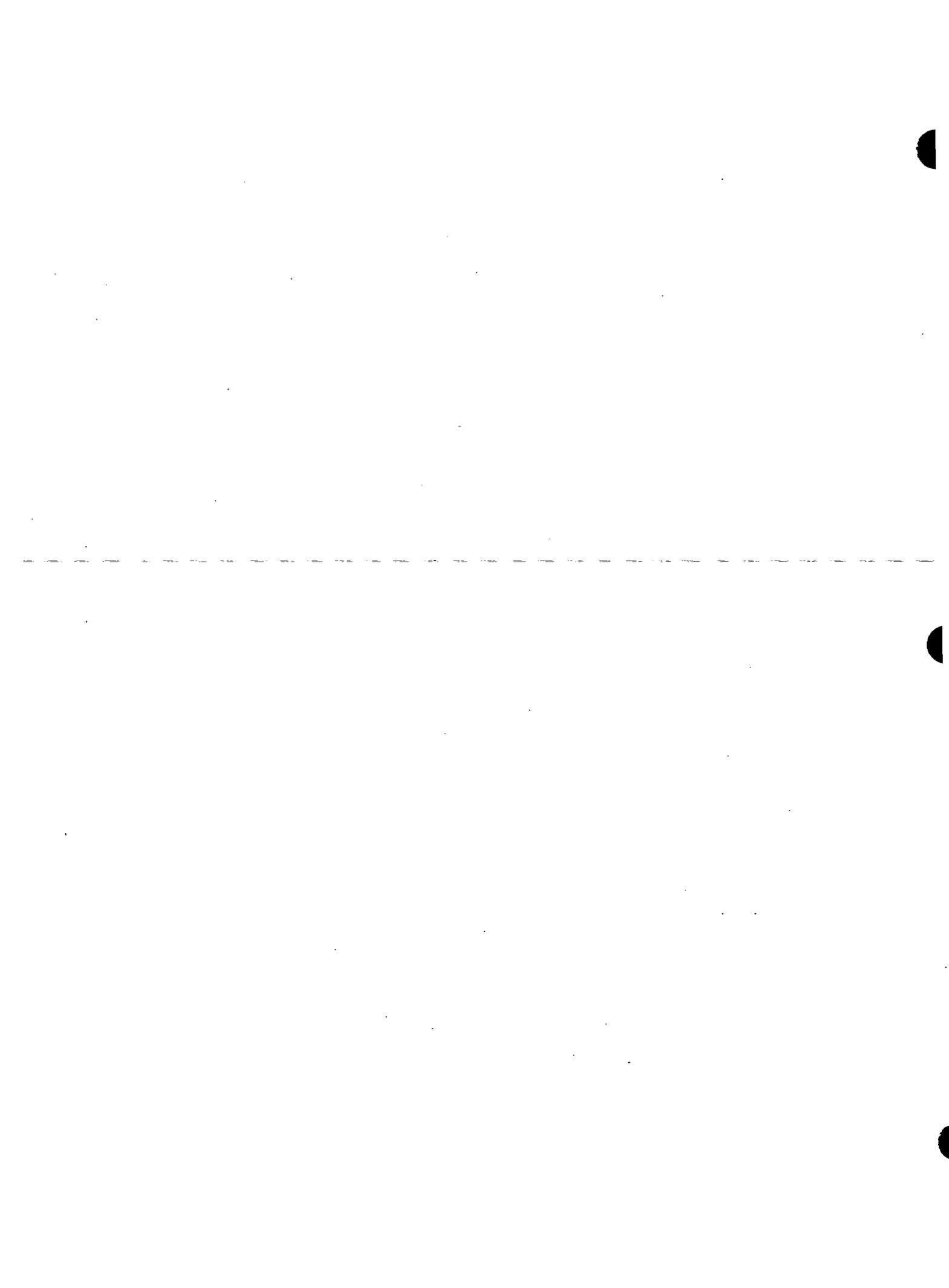
The following amendments are adopted.

Rescind subparagraph 15.5(4)"a"(1) and paragraphs 15.5(4)"b" to "g."

[Filed 3/4/99, effective 12/31/99]  
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