



# MINUTES

## DECEMBER 2018 MEETING ADMINISTRATIVE RULES REVIEW COMMITTEE

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### MEMBERS PRESENT

Senator Mark Chelgren, Chair	Representative Dawn E. Pettengill, Vice Chair [by teleconference]
Senator Jim Carlin [by teleconference]	Representative Steven Holt
Senator Mark Costello	Representative Megan Jones
Senator Robert E. Dvorsky	Representative Amy Nielsen
Senator Pam Jochum	Representative Rick Olson

EX OFFICIO, NONVOTING MEMBER: Sam Langholz, Administrative Rules Coordinator, Office of the Governor

LSA CONTACTS: Organizational staffing provided and minutes prepared by Jack Ewing, Administrative Code Editor, 515.281.6048, and Amber Shanahan-Fricke, Legal Counsel, 515.725.7354

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### BULLETINS NEEDED FOR THIS MEETING: 11/7/18, 11/21/18

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#### Procedural Business

Senator Chelgren convened the regular, statutory meeting of the Administrative Rules Review Committee (ARRC) at 9:03 a.m. on Friday, December 7, 2018, in Room 116, State Capitol, Des Moines, Iowa. The minutes of the November 13, 2018, meeting were approved. After considering alternative dates, the next meeting was scheduled for January 8, 2019, at 9:00 a.m. Mr. Jack Ewing, Administrative Code Editor, provided a preliminary rules analysis report. The meeting was adjourned at 11:34 a.m.

#### Fiscal Overview

Ms. Christin Mechler, Fiscal Legislative Analyst, presented the Legislative Services Agency (LSA) fiscal report.

#### HUMAN SERVICES DEPARTMENT

Representing the agency: Nancy Freudenberg

Emergency rulemaking, ARRC authorization required: State Supplementary Assistance

#### Emergency Rulemaking Authorized

A motion to authorize emergency rulemaking by the department carried on a 10-0 roll call vote.

Rulemaking type is indicated in parentheses following the ARC number. The acronyms have the following meanings: Notice of Intended Action (NOIA), Amended Notice of Intended Action (ANOIA), Notice of Termination (NOT), Adopted and Filed Emergency (AFE), Filed Emergency After Notice (FEAN), and Adopted and Filed (AF).

ARC 4106C (NOIA), Retroactive Medicaid Coverage Benefit—Residents of Nursing Facilities, Proposed Amendments to Rule 75.25 and Subrule 76.13(3)

Committee members inquired about the rationale for reinstating the three-month retroactive Medicaid coverage benefit. Ms. Freudenberg indicated that this was a legislative change. Ms. Erin Cubit spoke on behalf of the Iowa Hospital Association. She indicated that the Iowa Hospital Association submitted comments indicating that hospitals are going unreimbursed because hospitals provide services to all regardless of ability to pay. The Iowa Hospital Association asks that all providers be eligible for the benefits provided in this rulemaking: retroactive Medicaid enrollment. Committee members encouraged Ms. Cubit to submit her comments to the committee and the chairs of the Health and Human Services Committees.

No action taken on ARC 4106C.

ARC 4111C (AF), Developmental Disabilities Basic State Grant, Amendments to Chapter 38

No discussion on ARC 4111C.

ARC 4112C (AF), Support Enforcement Services, Amendments to Chapter 98

No discussion on ARC 4112C.

ARC 4113C (AF), Children's Residential Facilities—Abuse Reporting, Adoption of Rule 106.19

No discussion on ARC 4113C.

ARC 4114C (AF), Child Care Providers — Mandatory Prohibitions, Additional Background Checks, Amendments to Chapters 109, 110, and 120

No discussion on ARC 4114C.

ARC 4115C (AF), Child Care Assistance Rate Ceilings, Amendments to Rule 170.4

No discussion on ARC 4115C.

ARC 4126C (NOIA), Required Report for Juvenile Detention Reimbursement, Proposed Amendment to Subrule 167.3(2)

Committee members inquired about who was previously eligible to complete the report. Ms. Freudenberg indicated that previously it could be anyone on staff. The proposed rulemaking requires the person completing the report to have a background in accounting.

No action taken on ARC 4126C.

## **AGRICULTURE AND LAND STEWARDSHIP DEPARTMENT**

Representing the agency: Margaret Thomson

ARC 4138C (AF), Agricultural Lime—Sampling, Amendments to Rules 43.20, 43.32, and 43.34 and Subrule 43.35(1)

Committee members inquired as to the reasoning for the reduction of samples. Ms. Thomson indicated that the department has inspectors who are experienced and trained and those inspectors believe that they are able to do the job by taking just three samples. Ms. Thomson stated that if there is doubt, then the inspectors can take up to five samples.

Committee members engaged in a discussion with Ms. Thomson regarding market rates and long-term contracts. Ms. Thomson indicated that the department does not currently have a long-term contract with a vendor and the committee encouraged the department to obtain one.

No action taken on ARC 4138C.

## **AUDITOR OF STATE**

Representing the agency: Bernardo Granwehr

ARC 4125C (NOIA), Organization and Procedures, Proposed Amendments to Rules 25.4 to 25.8

Committee members inquired what was the motivating factor to change from four divisions to three divisions of the State Auditor's Office. Mr. Granwehr indicated that the rulemaking was intended to reflect current practice. Mr. Granwehr indicated that the practice predates his arrival and he has been with the State Auditor's Office for 14 years. Mr. Granwehr indicated that the Auditor-Elect has the prerogative to review the organizational structure when he comes into office.

No action taken on ARC 4125C.

## **UTILITIES DIVISION**

Representing the agency: Matthew Oetker

ARC 4120C (AF), Local Exchange Competition, Amendments to Rules 38.2, 38.4 to 38.7 and Subrule 38.1(2)

No discussion on ARC 4120C.

## **ECONOMIC DEVELOPMENT AUTHORITY**

Representing the agency: Jennifer Klein

ARC 4110C (AF), Future Ready Iowa Registered Apprenticeship Development Fund, Amendment to Chapter 13

No discussion on ARC 4110C.

## **INSPECTIONS AND APPEALS DEPARTMENT**

Representing the agency: Deborah Svec-Carstens

ARC 4139C (AF), Food and Consumer Safety—Food Code Updates, Inspection Frequency, License Fees, Time/Temperature Control for Safety Foods, Amendments to Chapter 30

No discussion on ARC 4139C.

ARC 4140C (AF), Food Establishment and Food Processing Plant Inspections, Amendments to Chapter 31

No discussion on ARC 4140C.

## **RACING AND GAMING COMMISSION**

Representing the agency: Brian Ohorilko

ARC 4107C (NOIA), Confidential Records; Licensing; Licensees' Responsibilities; Racing; Definition of "Minus Pool"; Gambling Games; Facility Internal Controls, Proposed Amendments to Chapters 3, 5 to 8, and 10 to 12

Committee members inquired whether the commission has filled the full-time equivalent position for the construction of the website. Mr. Ohorilko indicated that the position was filled at the bottom of the pay range. As such, the commission did not use all of the allotted money. The other part of the bill provided for funds for the development of a database. Mr. Ohorilko indicated that the commission was able to use an existing database. Mr. Ohorilko stated that therefore the commission did not use any of the allotted funds; instead, the commission will have an annual maintenance contract.

No action taken on ARC 4107C.

## **MANAGEMENT DEPARTMENT**

Representing the agency: David Roederer

### ARC 4141C (AF), Suspension and Reinstatement of State Funds, Adoption of Chapter 13

Committee members thanked the department for taking the committee's concerns into consideration in the adoption of the rulemaking.

No action taken on ARC 4141C.

## **PUBLIC HEALTH DEPARTMENT**

Representing the agency: Susan Dixon, Melissa Bird

### ARC 4127C (NOIA), Vital Records — Forms, Fees, Amendments, Reporting of Non-Institution Births, Delayed Certificate of Marriage, Proposed Amendments to Rules 95.1, 95.3, 95.6, 95.8, 96.7, 99.6, 99.9, 99.11 and Subrule 98.7(6)

Committee members expressed that they expected the rulemaking to be improved upon a second review. Specifically, committee members noted that the definition of "doula" likely unintentionally encompassed individuals who would not want to be considered a doula because the definition does not include a requirement that the person be hired or designated as a doula. Committee members inquired whether that was the intention of the department. Ms. Bird indicated that the intention of the rule was to ensure that any individual assisting a birthing mother during labor is primary in reporting to the state registrar that birth secondary to the parent. Committee members inquired whether a mother-in-law assisting in a birth would be considered a doula. Ms. Bird stated she would look into the issue.

Committee members and Ms. Bird also briefly discussed fees for services provided by a state registrar or county registrar, overpayments, non-institution births, delayed marriage certificates, and amendments of vital records by an order to amend the record by a court of competent jurisdiction. Committee members advised that if specific language must be in a court order in order to amend a birth certificate, the department should provide the language in rule.

No action taken on ARC 4127C.

## **PROFESSIONAL LICENSURE DIVISION**

Representing the agency: Susan Reynolds

### ARC 4116C (AF), Chiropractic Physicians — License Reactivation, Amendment to Subparagraph 41.14(3)"b"(3)

No discussion on ARC 4116C.

### ARC 4128C (NOIA), Physician Assistants — Opioid Prescribing Practices, Proposed Amendments to Rule 326.1, Subrules 327.6(3) and 329.2(32), and Paragraph 328.3(2)"d"

No discussion on ARC 4128C.

### ARC 4129C (NOIA), Chiropractic Physicians — Continuing Education Hours, Proposed Amendment to Subrule 41.14(3)

No discussion on ARC 4129C.

### ARC 4130C (NOIA), Supervision of Physician Assistants at Remote Medical Sites, Proposed Amendment to Subrule 327.4(2)

Committee members asked the division to consider the role of artificial intelligence in licensing.

No action taken on ARC 4130C.

## **NURSING BOARD**

Representing the agency: Kathy Weinberg

### **ARC 4132C (NOIA), Advanced Registered Nurse Practitioners, Proposed Adoption of Chapter 7**

Committee members inquired what problem this rulemaking is solving. Ms. Weinberg responded by stating that the rulemaking is making sure Advanced Registered Nurse Practitioners (ARNPs) practice within their role and the population in which they specialized and have been certified and making sure that they meet the current standards of care based on their professional certifying body, their professional organization, and their education and experience.

Mr. Dennis Tibben, representing the Iowa Medical Society (IMS), stated the IMS and the medical community at large are extremely concerned by the rulemaking. He stated that ARNPs had no clearly defined statutory scope of practice act and there is only a single line of statute in the Iowa Code. He stated that there has been no involvement by the medical community in the development of the rulemaking. Mr. Tibben urged legislative involvement prior to any rulemaking. In response, committee members encouraged the board to engage the medical community to advance the rulemaking. Mr. Kevin Kruse, representing the Iowa Association of Anesthesiology, spoke against the rulemaking, arguing that there has been no new grant of rulemaking authority from the General Assembly.

The following organizations were represented at the meeting and spoke in support of the rulemaking: Iowa Association of Nurse Anesthetists, Iowa Nurses Association, Iowa Pharmacy Association, and Iowa Association of Nurse Practitioners. Ms. Lynn Boes, representing the Iowa Nurses Association, spoke in favor of the rulemaking and argued that the Iowa Supreme Court in *Iowa Medical Society v. Iowa Board of Nursing*, 831 N.W.2d 826 (Iowa 2013) held that the board has the legal authority to determine the proper nursing scope of practice without the input of other medical professionals. In other words, the board does not need to consult physicians in the course of the board's rulemaking process.

Committee members encouraged the board to identify the parts of the rulemaking that are controversial and report to the committee at the next review which would permit the committee to execute a delay on only the parts of the rulemaking that are controversial, thus allowing the parts of the rulemaking that are not controversial to go into effect.

No action taken on ARC 4132C.

## **SECRETARY OF STATE**

Representing the agency: Molly Wyatt

### **ARC 4146C (AF), Local Option Sales and Services Tax Elections in Qualified Counties, Adoption of Rule 21.804**

No discussion on ARC 4146C.

## **TRANSPORTATION DEPARTMENT**

Representing the agency: Sara Siedsma

### **ARC 4119C (AF), Sanctions, Amendments to Chapter 615**

Committee members asked how many drivers would have their licenses reinstated due to this rulemaking, and Ms. Siedsma replied that she would need to get back to the committee with that information.

No action taken on ARC 4119C.

## **TREASURER OF STATE**

Representing the agency: Karen Austin

### **ARC 4123C (NOIA), Iowa ABLE Savings Plan Trust, Proposed Adoption of Chapter 20**

In response to questions from committee members. Ms. Austin explained that this rulemaking was authorized by Iowa Code chapter 12I and that the Office of the Treasurer of State had worked with its attorney to ensure the rulemaking is aligned with the Iowa Code.

No action taken on ARC 4123C.

### **ARC 4124C (NOIA), Iowa Educational Savings Plan Trust, Proposed Rescission and Adoption of Chapter 16**

No discussion on ARC 4124C.

## **REVENUE DEPARTMENT**

Representing the agency: Tim Reilly

### **ARC 4108C (NOIA), Personal Transportation Service, Proposed Amendment to Rule 26.80**

Mr. Matt Eide made a public comment on behalf of Uber. He stated that Uber wants to work collaboratively with the department on these rules as Uber has done in other states. He stated that Uber and the department have had a series of meetings and telephone conversations since June to discuss three concerns. First, Uber wants to collect the tax itself, rather than have its drivers collect the tax. Uber wants language to that effect included in the rulemaking. Second, Uber is concerned that it will be subject to new marketplace facilitator rules from the department, which Uber feels would amount to double taxation. The rules are supposed to be effective soon, but the department has only issued guidance thus far. Third, Uber wants to ensure equality between Uber and taxi cab companies in the department's rules. He stated that if Uber's concerns are not resolved by the end of December, Uber will not collect sales tax itself, and the department will have to pursue collection from its drivers. He also explained how the Uber application would process the sales tax if Uber collects the tax.

Mr. Reilly clarified that only sales tax is at issue in this rulemaking, not any other taxes. Committee members asked why the department had not addressed Uber's concerns. Mr. Reilly explained that the department agrees with Uber that Uber and not its drivers should collect the sales tax and feels that the proposed rules reflect that already. He stated that the department is willing to continue to discuss this with Uber, but the department has maintained this position since June. Committee members asked about the department's time frame for implementing the marketplace facilitator rules, and Mr. Reilly explained that the department hopes to have the rules in place by the 2019 Legislative Session. He explained that the department has a limited number of personnel who can write rules, but guidance on marketplace facilitators will be included on a website the department has created containing guidance on the implementation of Senate File 2417.

Committee members asked if a session delay imposed on this rulemaking upon adoption if Uber's concerns are not resolved would cause any problems with the implementation of Senate File 2417. Mr. Reilly explained that the sales tax at issue is imposed by statute and would still apply; the rules only clarify the statute. Committee members asked if the department would adopt Uber's preferred language to resolve the issue, and Mr. Reilly stated the department is open to that. Committee members also asked why there remained so much uncertainty regarding the department's expectations about compliance with these sales tax changes, and Mr. Reilly stated that the department's guidance should help alleviate any uncertainty. In response to additional questions, Mr. Reilly explained that this rulemaking does not affect Netflix, that the sales tax at issue will be imposed starting January 1, 2019, and that the language at issue is the definition of "personal transportation service" and a cross reference to Iowa Code chapter 321N, which regulates transportation companies.

In additional discussion amongst committee members, Mr. Eide, and Mr. Reilly, Mr. Eide explained that Uber wants language added to the rulemaking that makes clear that the sales tax is to be collected by Uber itself because Uber's attorneys do not currently believe the statute or rulemaking clearly requires that. He stated that Uber wants to collect the sales tax, but will not do so without further clarifying language. Mr. Reilly stated that Uber had no concerns about collecting the sales tax when their discussions began in June, before the rulemaking was drafted.

Mr. Scott Weiser made a public comment on behalf of Mr. Randy Sackett, owner of Trans Iowa, which operates Yellow Cab. He explained that his client leases vehicles to drivers who are independent contractors and does not think the statute or rulemaking applies to his company at all. He explained that his client has sought a declaratory ruling about this from the department and is concerned about the possible effects of the department's marketplace facilitator rulemaking. He stated that his client will not collect sales tax.

Committee members urged the department to provide greater clarity to the public on these matters. Committee members suggested that the department implement a two-tiered sales tax system that differentiates between businesses providing services via the Internet and traditional businesses and that businesses providing services via the Internet should, as fiduciaries, collect sales tax themselves. Committee members acknowledged that the department may lack statutory authority to pursue such an approach.

No action taken on ARC 4108C.

ARC 4118C (AF), Indication of Dependent Child Health Care Coverage on Tax Return, Rescission of Rule 38.19

No discussion on ARC 4118C.

ARC 4133C (NOIA), Excise Tax Rate on Motor Fuels, Proposed Amendment to Subrule 68.2(1)

No discussion on ARC 4133C.

ARC 4143C (AF), Research Activities Credit, Amendments to Rules 42.11 and 52.7

Committee members stated that clarifying language relating to employee stock ownership plans is needed in this rulemaking.

No action taken on ARC 4143C.

ARC 4144C (AF), Baseball and Softball Complex Sales Tax Rebate, Amendment to Rule 235.2

No discussion on ARC 4144C.

ARC 4145C (AF), Raceway Facility Sales Tax Rebate, Adoption of Rule 235.3

No discussion on ARC 4145C.

ARC 4117C (AF), Commercial Fertilizer and Agricultural Limestone—Exemption from Sales and Use Tax, Amendments to Rules 17.4 and 226.6 and Subrule 18.57(1)

No discussion on ARC 4117C.

ARC 4142C (AF), Section 179 Expensing, Amendments to Rules 40.65, 53.23, and 59.24

No discussion on ARC 4142C.

ARC 4109C (NOIA), Exemptions Primarily Benefiting Manufacturers and Other Persons Engaged in Processing, Proposed Amendments to Rule 211.1 and Subrules 230.2(1) and 230.15(4)

Mr. Reilly summarized the various public comments the department had received about the rulemaking and explained that some concerns raised would require statutory changes while a request to modify a rebuttable presumption relating to retail sales will be addressed when the rulemaking is adopted. Committee members asked Mr. Reilly to discuss any statutory changes that might be needed with the chairpersons and ranking members of the Senate and House Ways and Means Committees, and he agreed.

Committee members asked if an entity that largely engages in manufacturing would lose the sales tax exemption for manufacturing if the entity engages in any construction, given that construction is not eligible for the exemption under the statute. Mr. Reilly confirmed that manufacturers would lose the exemption if they engage in any construction and noted that the department is seeking to clarify this in the rulemaking. He stated that a statutory change would be necessary to completely resolve the issue. Committee members asked if the exclusion of construction contractors from the manufacturing exemption would apply to a manufacturer who provides logistics support at a job site at which construction is going on, and Mr. Reilly explained that it would not as long as the manufacturer was complying with the statutory requirements for the exemption. Committee members asked if the exemption would apply to a manufacturer engaged in an industry such as roofing if the manufacturer's

employees demonstrate to a customer how a roofing project should be carried out, and Mr. Reilly stated that he would need to look into that further.

Ms. Jennifer Kingland made a public comment on behalf of the Iowa Taxpayers Association. She stated that she just received a revised version of the rulemaking from the department and would need to review it before commenting further, but she appreciated the department's work on the matter.

Ms. Nicole Crain made a public comment on behalf of the Association of Business and Industry. She stated that there are still some issues with the rulemaking, but she is reviewing the department's proposed changes to the rulemaking. She stated that she would like to see some clarification regarding the treatment of an entity commonly understood to be a manufacturer that does some consulting on a construction project.

Ms. Christine Hayes made a public comment on behalf of Lifeserve Blood Center. She explained that Lifeserve had strongly opposed Senate File 2417 because it excluded nonprofit organizations, which include Lifeserve, from the definition of "manufacturer," making them ineligible for tax exemptions applicable to manufacturers for which they had previously been eligible. She stated that Lifeserve is considered a manufacturer under federal law and explained how the process of processing donated blood and preparing it for another person to receive involves manufacturing. She also expressed concern about Senate File 2417 imposing tax liability for software used by Lifeserve. She stated that Senate File 2417 imposes \$750,000 in new taxes on Lifeserve's equipment. She stated that for-profit blood centers still receive the exemption. She stated that Iowa is now the worst state in the country to be a nonprofit blood center and is one of only three states that taxes nonprofit blood centers. She asked that blood centers and organ procurement organizations receive a statutory sales tax exemption and described how such an exemption could be drafted. She stated that Lifeserve is one of only two nonprofit blood centers in Iowa, employs 350 employees, and provides 99 percent of blood required for transfusions by Iowans. Committee members asked Ms. Hayes to provide her proposed language to the committee. Committee members asked Mr. Reilly if the department interprets the statutory language relating to blood centers the same way as Lifeserve does regarding their ineligibility for the tax exemption, and he agreed.

No action taken on ARC 4109C.

## **ADMINISTRATIVE SERVICES DEPARTMENT**

Representing the agency: Tami Wiencek, Janet Phipps

ARC 4134C (AF), Update of Processes, Procedures, and References, Amendments to Chapters 4, 6, 43, 45, 46, 60, 64, 71, 103, 110, and 117 to 119

No discussion on ARC 4134C.

ARC 4135C (AF), Hiring of Iowa National Service Corps or AmeriCorps Participants, Adoption of Subrule 54.5(3)

No discussion on ARC 4135C.

ARC 4136C (AF), Peace Officers and Fire Fighters—Continuation of Benefits, Adoption of Subrule 64.15(3)

No discussion on ARC 4136C.

ARC 4137C (AF), Procurement of State Vehicles—Elimination of Life Cycle Costing, Amendment to Rule 117.12

Committee members stated that eliminating life cycle costing would not always create better value for taxpayers, as some companies make better products the value of which would not be reflected.

Committee members asked if the rulemaking would require state troopers to switch the vehicle they use if a different manufacturer offered a lower price. Ms. Wiencek stated that she was unsure and would get back to the committee about this.

No action taken on ARC 4137C.



ARC 4122C (NOIA), Update of Human Resources Policies and Procedures, Proposed Amendments to Rules 68.1 and 68.6 and Subrule 68.2(2)

Committee members inquired why suggestions made during the emergency meeting on October 25, 2018, were not implemented. Director Phipps stated that the suggestions, including whether to make training mandatory, were under consideration by the Governor's Office. Committee members stated that the definition in the rulemaking of sexual harassment does not reflect the Iowa Code and accused Director Phipps of misrepresenting that it did reflect the Iowa Code. Director Phipps responded that she did represent that it reflected the law. She stated she would look into the committee members' assertion that it was not a complete and accurate representation of the law. Committee members stated that they were still waiting to find out how many harassment complaints have been filed against the state. Director Phipps stated that the Attorney General would be responding and would state that information is confidential. Committee members expressed a preference that violation of sexual harassment or retaliation policies result in a policy that a person "shall be subject to discipline" rather than "may be subject to discipline." Director Phipps responded that routinely department policies say "may be subject to discipline" but most of the time some level of discipline is administered. Committee members disagreed with that approach. Additionally, committee members admonished the department regarding the rules in general; stating that the rules were a "sham" and that the department should have done better. Committee members also requested that the rules provide for an option for an external investigation. In response, Director Phipps stated that the policies provide that an employee may file an external complaint with the Iowa Civil Rights Commission or the Equal Employment Opportunity Commission, which may investigate. Mr. Sam Langholz, Administrative Rules Coordinator and ex officio, nonvoting member of the committee, clarified that these rulemakings were filed the same day as the emergency rulemaking was approved by the committee, the day of the emergency meeting, which is why the rulemakings do not incorporate suggested changes. Committee members stated that they look forward to the department coming back to the committee with suggestions incorporated.

Mr. Daniel Zeno spoke on behalf of the American Civil Liberties Union of Iowa. He stated that the emergency rules narrowed the definition of sexual harassment under Iowa Code chapter 19. He proposed that these rules should, at the very least, go as far as the pre-emergency rules. He proposed mandatory training for all state employees for every protected class under the Iowa Civil Rights Act. Mr. Zeno stated that the emergency rules provide limited direction for state agencies other than the department and indicated that there are no timelines or requirements for documentation. He stated that the objective of administrative rules should be to provide clarity. He urged the department to provide timelines and establish expectations for parties in the rules.

No action taken on ARC 4122C.